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Supreme Court, U.S.
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Docket Number OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

MARY S. VANDERWOUDE HILL
and
JAMES J. HILL,
Petitioners

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fourth Amendment prevents the Commonwealth of Virginia from convicting and punishing Ms. Hill for refusing to allow a food inspector into buildings in the curtilage of her home to make a sanitary inspection when he had no warrant.

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STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT.

A. Date the order sought to be reviewed was entered: September 7, 2006

B. Date of any order respecting a rehearing: November 17, 2006

C. Express reliance on Rule 12.5: not applicable.

D. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. sec. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE:

U.S. Const., Amend., IV

U. S. Const., Amend. XIV, "[N]or shall any state deprive any person of life, liberty, or property without due process of law..."

Magna Charta, sec. 29 (1225)

22 Geo. 3, c. 58, sec. 1

Virginia Acts of Assembly, Ch. 285, 1940

Federal Food, Drug and Cosmetic Act, c. 675, June 25, 1938, 52 Stat. 1040

V.C. sec. 3.1-386, "This article may be known, designated and cited as the 'Virginia Food Act.'"

V.C. sec. 3.1-387, "For the purpose of this article:

(1) The term "Commissioner" means the Commissioner of Agriculture and Consumer Services...

V.C. sec. 3.1-388, "The following acts and the causing thereof within the Commonwealth are hereby prohibited:

...

(c) The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by sec. 3.1-399."

V.C. sec. 3.1-388.1

V.C. sec. 3.1-390(a), "Any person who violates any of the provisions of 3.1-388 shall be guilty of a misdemeanor and shall on conviction thereof be punished in the manner provided by law for the punishment of misdemeanors..."

V.C. sec. 3.1-391

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V.C. sec. 19.2-397

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21 U.S.C. sec. 333(a)

2 VAC 5-600-10.C

21 C.F.R. sec. 1240.61

STATEMENT OF THE CASE

Mary S. Vanderwoude Hill and James J. Hill (the latter dying during the appeal, and the prosecution being dismissed as to him) own a 200 acre farm in rural Fauqu-

ier County, Virginia. They live on it as its sole occupants. On the farm, they own usually about eight goats: six milking goats (one dry) and two bucks, and one of them will milk a goat in an opaque milking parlor about ninety feet from the personal residence.

From the milk, they make cheese which they sell openly at a nearby farmers' market on week-ends from April through November. The labels identify their farm, Vanderwoude-Hill Farm, as the source of the cheese. They have been doing this for many, many years.

The Commissioner of the Virginia Department of Agriculture and Consumer Services ("VDACS"), sends employees to the various farmers' markets, and one noticed them at the market, which led to VDACS employee James Buchanan buying their cheese at the market. A supervisor asked Gerald W. Williams, a VDACS food inspector, to inspect the farm in March, 2000 (Appendix to petition for writ of certiorari ["App."], page [] 84). He responded by driving to the farm and entering it unannounced on 8/2/00, accompanied by another inspector and a deputy sheriff (App. 85) He announced to the Hills an intent to inspect the farm relating to the goat cheese operation, but they protested, and he left.

Later, he and the Hills arranged an appointment in September, 2000, when he inspected. About a year later, another appointment was made, and an inspection done on 10/2/01 (App. 89). Williams did not attempt another inspection until 5/19/03 when he appeared unannounced (App. 90), but the Hills told him he would have to have an appointment, and one was scheduled. In the interim, the Hills notified Williams they were not permitting him back on the property without a search warrant (App. 91).

Notwithstanding, Mr. Williams drove to it on July 9, 2003, with no search warrant or other warrant. One accesses the residence, milking parlor and other typical

farm buildings by a dirt gravel road that forms a "T" intersection with the public road, Bristersburg Rd., the only entrance. At this point, two prominent No Trespassing signs are posted on one side of the intersection, and a third is posted on the other, but the driveway is not gated.

The farm is generally enclosed by fencing, bushes and trees, which conceal the residence and milking parlor from Bristersburg Rd.. Williams drove off it onto the private driveway, and followed it up to where the residence and milking parlor and other buildings come into view. At that time, the Hills were standing in their front yard, generally between the residence and milking parlor.

The inspectors drove up to them, exited their vehicles, and expressed a desire to inspect the farm. The Hills inquired if they had a search warrant (App. 92). Mr. Williams replied that he did not, and Mr. Hill at that point told Mr. Williams he would have to leave.

The inspectors left, and Williams went before a magistrate to obtain a Summons charging each with refusal to permit entry ~~of the~~ Commissioner's duly authorized agents to his/her goat cheese manufacturing, processing and/or storage facility for the purpose of making an inspection in violation of Va. Code sec. 3.1-388(e), "class 1 misdemeanor," in the general district court. The Hills, pro se, claimed the Fourth Amendment gave them a right to refuse a warrantless search, but the court disagreed, and convicted each, who appealed to the circuit court, engaging undersigned.

Undersigned filed a pre-trial motion to dismiss (App. 79), contending the court could not convict the Hills of such refusal because of U.S. Const. Amend. IV. A pre-trial hearing was held where Ms. and Mr. Hill testified (App. 94-96), and the Commonwealth offered no evidence. In opposition to such motion, the Commonwealth cited an unpublished opinion by the Va. Court of Appeals in Solem and Coles v. Commonwealth, in which the

Court had said that when Solem refused a warrantless search of her goat cheese farm, such was a basis for a search warrant to search the farm. The circuit court, the Honorable Jeffrey W. Parker, Judge, weighed a published decision by a fellow circuit judge, the Honorable Paul M. Peatross, Solem v. Courter, 57 Va. Cir. 143 (2001), ruling a goat cheese farmer was not "pervasively regulated," and warrants were needed, against such unpublished Court of Appeals decision, and concluded that the "pervasively regulated" exception applied. He thus denied the motion (App. 36).

The Hills then filed a petition for prohibition against Judge Parker with the Court of Appeals, contending that under Camara v. Municipal Court, 387 U.S. 523 (1967) refusal to submit to a warrantless search of a residence could not be a "crime," and hence the general district court, and the circuit court on appeal therefrom, lacked criminal subject matter jurisdiction. The Court of Appeals denied such on the rationale that in Virginia prohibition did not lie to challenge the constitutionality of a statute defining a criminal offense, and thus did not decide the Fourth Amendment issue (App. 42). The Hills appealed to the Virginia Supreme Court which refused their petition for appeal (App. 41).

The prosecution thus went forward in the circuit court, and at a jury trial, the jurors returned a verdict of guilty as to each, and recommended a fine of $100 as to each. The trial court, the Honorable James Chamblin, entered judgment on the verdict, suspending execution pending appeal. The Hills then appealed to the Virginia Court of Appeals.

About the same time, they filed a complaint for injunction and declaratory relief in federal district court, seeking an injunction solely against future searches based on the Fourth Amendment. The Honorable U.S. District Judge T.E. Ellis dismissed their complaint on authority of

Ex Parte Young, ruling that any decision by him would affect the then pending prosecution. Hill v. Courter, 344 F.Supp.2d 484 (E.D. Va. 2004).

The Hills filed a petition for appeal from their convictions with the Va. Court of Appeals, again contending that under the Fourth Amendment they could not be convicted. A single judge refused such, but on demand for a 3 judge panel, a 3 judge panel granted the petition. In Hill v. Com., 47 Va.App. 442, 624 S.E. 2d 666 (2006), a panel of the Court affirmed the conviction, ruling the Hills were pervasively regulated.

The Hills then filed a petition for appeal with the Va. Supreme Court, again raising their Fourth Amendment contention, which Court refused the petition. The Hills filed petition for rehearing, again raising the Fourth Amendment claim, and the Supreme Court denied such as well. As noted, Mr. Hill died, and undersigned filed a motion to dismiss the prosecution as to him which the Court granted.

Ms. Hill now files her petition with this Honorable Court.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This case involves the ability of a state to impose a criminal sanction, including a stiff jail sentence, upon an individual when an administrative inspector asserts a right to enter his private residence without a warrant, and the individual claims he needs one and refuses entry without one. This Court held in Camara v. Municipal Court, 387 U.S. 523 (1967) that the state could not do so. The question is whether a line of precedents after Camara's companion case, See v. City of Seattle, 387 U.S. 541 (1967) - Colonnade-Biswell-Marshall-Donovan-

Burger[1] - involving administrative inspections of commercial premises, where no residence is involved, culminating in New York v. Burger, 482 U.S. 691 (1987), affects the vitality of that precedent in this case.

The Court of Appeals of Virginia ("Court of Appeals") opined (and the Supreme Court of Virginia refused to grant an appeal) that if a home owner operates a "pervasively regulated industry," as defined in Burger, from his home, then administrative inspectors may enter it without a warrant, provided the other requirements of Burger are met, namely, that the state have an interest promoted by the search, that warrantless searches be necessary to promote that interest, and that the statutory schema be sufficiently detailed to constitute an adequate substitute for a warrant. Hill v. Com., 47 Va.App. 442, 624 S.E.2d 666 (2006). It further opined that the state may seek to coerce submission to such warrantless entries by way of a criminal sanction involving an extensive jail sentence. Mary S. Vanderwoude Hill disagrees.[2]

The Virginia general assembly adopted a set of statutes known as the Virginia Food Act by Virginia Acts of Assembly, Ch. 285, 1940, which included sec. 14, appearing in the current Code as Virginia Code ["V.C."] section ["sec."] 3.1-399:

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1. "Colonnade" refers to Colonnade Corp. v. United States, 397 U.S. 72 (1970), and "Marshall" refers to Marshall v. Barlow's, Inc., 436 U.S. 307 (1977).

2. Ms. Hill, like Camara, believes that it cannot be a "crime" to refuse a warrantless search of a residence, and hence cannot be a "misdemeanor," and hence the courts below lacked subject matter jurisdiction, so their orders are void, not merely erroneous. Thus, she, like Camara, believes that, properly considered, the order should be subject to an extraordinary writ of prohibition, not mere appeal.

> The Commissioner [V.C. sec. 3.1-387(1) defines the "Commissioner" as "the Commissioner of Agriculture and Consumer Services"], acting through his duly authorized agents, shall have free access at all reasonable hours to any factory, warehouse, or establishment in which foods are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold such foods in commerce, or any store, restaurant or other place in which food is being offered for sale, for the purpose:
>
> (1) Of inspecting such factory, warehouse, establishment, or vehicle to determine if any of the provisions of this article[3] are being violated; and
>
> (2) Of securing samples or specimens of any food after paying or offering to pay for such sample. It shall be the duty of the Commissioner to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of this article is being violated.[4]

V. C. sec. 3.1-388(e), which states, "The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by sec. 3.1-399," is "prohibited," and V.C.

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3. The other provisions of "this article," namely, article 3, concern food safety, for example, V.C. sec. 3.1-388.1 prohibits removing food labels, V.C. sec. 3.1-391 directs the Commissioner to condemn unsafe food, etc..

4. This language has been unchanged from 1940 through the Court of Appeals' decision, save that the legislature added a last paragraph by Va. Acts of Assembly, c. 420, 2003, "This section shall not apply to nonprofit organizations holding one-day food sales."

sec. 3.1-390(a) (section 5(a) of the Act), states,

> Any person who violates any of the provisions of sec. 3.1-388 shall be guilty of a misdemeanor and shall on conviction thereof be punished in the manner provided by law for the punishment of misdemeanors.

V.C. sec. 18.2-12 states that where an offense is a misdemeanor, it "shall be deemed to be a class 1 misdemeanor[,]" and V.C. sec. 18.2-11 makes class 1 misdemeanors punishable by jail up to twelve months and a fine up to $2,500.[5]

Nowhere does the schema require an agent of the Commissioner, faced with a refusal to give "free access," to obtain a warrant, and the Court of Appeals ruled that the Commonwealth may convict for a refusal to a warrantless request for free access.[6] Examining the Virginia

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5. Notwithstanding, the Assistant Commonwealth's Attorney offered to undersigned a jury instruction instructing the jury that punishment would be up to 100 days in jail or a $100 fine (he drew such from the penalty for a V.C. sec. 3.1-418 violation), and undersigned did not object to such, it was given, and hence such is the law of this case only.

6. The Virginia legislature adopted a schema for issuance of administrative inspection warrants by Va. Acts of Assembly, c. 625, 1976, sections 19.2-393, et. seq., in obvious response to Camara-See, which include provision that, in case of a dwelling, consent to entry must be "sought and refused," and notice given 24 hours prior to executing a warrant. V.C. sec. 19.2-396. The Court of Appeals did not believe such provisions prevailed over the warrantless entry authorized by 3.1-399.

Virginia's statute that "[s]earch warrants may be issued," V.C. sec. 19.2-53, is ancient, as is V.C. sec. 19.2-59, "No officer of the law or other person shall search any place... except by virtue of and under a

Food Act in its totality[7], it is substantially identical to the food provisions and inspection section of the Federal Food, Drug and Cosmetic Act of 1938, c. 675, June 25, 1938, 52 Stat. 1040, and obviously modelled after them. Thus, for example, V.C. sec. 3.1-399 is analogous to 21 U.S.C. sec. 374[8], V.C. sec. 3.1-388 is identical to 21 U.S.C. sec. 331, V.C. sec. 3.1-390(a) is analogous to 21 U.S.C. sec. 333(a), etc..

In not a single precedent in approximately 70 years of federal enforcement of the 1938 Act, has the Secretary of Agriculture ever attempted to enforce it with respect to a private residence. 35 Food Drug Cosmetic Journal 25, The Constitutionality of Warrantless Inspections by the Food and Drug Administration, and 18 ALR Fed 734, FDA - Entry and Inspection of Plant, collect a number of these precedents. Nevertheless, the Court of Appeals as an appellate case of first impression held that the Hills' farm was an "establishment" within the meaning of sec. 3.1-399. See, e.g., Hill v. Com., 47 Va.App. 442, 452, 624 S.E.2d 665, 671 "any person operating an establishment

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...Continued...

warrant issued by a proper officer."

7. V.C. sec. 3.1-386 states, "This article may be known, designated and cited as the 'Virginia Food Act.'"

8. 21 U.S.C. sec. 374, states, in pertinent part,"(a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner.., are authorized (A) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce.. or to enter any vehicle... and (B) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory..."

where food is manufactured... should be on notice what is regulated."

The Court of Appeals' view that the farm was an "establishment" is consistent with McClellan v. Com., 39 Va.App. 759, 576 S.E.2d 785 (2003), wherein it held that Terry McClellan's personal residence was a "food manufacturing plant" within the meaning of V.C. sec. 3.1-398.1[9] when she used the kitchen therein to convert goats' milk into goats' cheese. And it is consistent with the view of both the Virginia Supreme Court and another panel in Parker v. Commonwealth, 42 Va.App. 358, 592 S.E.2d 358 (2004), affirmed 269 Va. 174, 608 S.E.2d 925 (2005), that Brenda Parker's home kitchen was such a "food manufacturing plant." Thus, the Court of Appeals affirmed the Commissioner's position that if one makes a single cupcake in his kitchen, and offers it for sale, then one must give "free access" to the Commissioner's agents, and upon refusal, one has committed a crime. [10]

Five lower federal courts, whose decisions have never been overruled, have held that the Fourth Amendment prevented the federal government from convicting managers of purely commercial premises, involving no residence, under 21 U.S.C. sec. 331(f)-333(a), for refusing to allow entry for warrantless inspections: (1) United States v. Stanack Sales Co., 387 F.2d 849, 852-53 (3rd Cir. 1968) ("We conclude that unless the

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9. V.C. sec. 3.1-398.1 states, "No person shall operate a food manufacturing plant, food storage warehouse, or retail food store until it has been inspected by the Commissioner...."

10. Commonwealth's Ex. #2, 4/8/04, includes, "For operation from a home kitchen..." Appendix in the Court of Appeals, pages 70a-m.

appellants waived their rights under the Fourth Amendment their convictions cannot constitutionally stand."); (2) United States v. Kramer Grocery Co., 418 F.2d 987 (8th Cir. 1969) ("[C]onsent is ordinarily required in warrantless searches of commercial premises by inspectors of FDA ["Food and Drug Administration"]. Camara and See require this result."); (3) United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969) ("Under the Act [FDCA] as the law has been elucidated by the Supreme Court in See, supra, when consent to inspect is withheld, the agents must then obtain a search warrant under the standard procedure, and it is only after a warrant is procured that an individual or company may be prosecuted for refusing to allow inspection."); (4) United States v. I.D. Russell Laboratories, 439 F.Supp. 711, 716-17 (W. D. Mo., 1977) ("[D]efendants were entirely within their rights in refusing any inspection demanded pursuant to the various Notices of Inspection which were served upon them.")[11]; (5) United States v. Kendall Co., 324 F.Supp. 628, 630, n. 1 (D. Mass. 1971) ("It is settled in the light of Camara v. Municipal Court.. and See v. City of Seattle... that the law cannot constitutionally require a proprietor to allow inspection without a warrant at the risk of criminal penalties.")

Technically, Williams helped himself to "free access" to the area within the curtilage by driving past the No Trespassing signs. Once within the curtilage where he met the Hills, their denial of free access was a denial of permission to inspect any building within the curtilage, including the residence. However, the Court of Appeals

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11. The "Notice[] of Inspection" is Defendant's Exh. # 2 filed 1/22/04. The copy was obtained from Federal Procedural Forms, sec. 31:171, p. 369 (1999 revision). It sets forth 21 U.S.C. sec. 374(a).

recognized that had he searched a building within the curtilage, including the milking parlor, such would be the equivalent of a search of the residence itself for Fourth Amendment purposes. See, e.g., Hill v. Com., 47 Va.App. 442, 458, 624 S.E.2d 666, 674 (2006), "By producing goat cheese within the curtilage of their home..." See also United States v. Dunn, 480 U.S. 294 (1987).

The Old English Common Law

Before discussing Camara and See through Burger, we should examine whether the Crown could convict a person for refusal to allow a warrantless entry into a residence under the English common law prior to our Founding because the Framers intended the Fourth Amendment to give at least as much protection to the home as existed at common law. This Court has held with respect to the Fifth Amendment due process clause, worded identically to the Fourteenth Amendment due process clause, that such clause is but a simplified modern version of Magna Charta, sec. 29 (1225) resulting from the Founding Fathers' desire to use Sir Edward Coke's interpretation of it. [12] A "due process" violation occurs when an explicit right under the Bill of Rights is violated, or when the conviction is contrary to the settled processes of the old English common law adopted in this country after the founding. Murray's lessee, etc. v. Hoboken Land and Improvement Co., 59 U.S. (18 Howard) 272, 277 (1855). And this Court has stated that

12. "[No Freeman shall be taken, imprisoned, etc....] [b]ut by the Law of the Land.' For the true sense and exposition of these words see the Statute 37 E.3.cap.8 where the words, 'by the law of the Land', are rendered, 'without due process of Law'..." II Coke's Institutes, Magna Charta, Cap. 29, p. 50.

the Revolution itself and the Fourth Amendment in particular were borne out of anger in Americans over searches under writs of assistance, and James Otis's inveighing against them in Paxson's Case. Lasson, History and Development of the Fourth Amendment (1937); X The Works of John Adams, p. 314, letter to William Tudor. Was there ever a statute making it an offense for a person to refuse a warrantless entry into his home, or precedent where a person was convicted for so refusing? Undersigned can find none.

Coke contended that the warrants were contrary to Magna Charta, ch. 29, because no statute then authorized their issuance[13], but subsequently statutes were adopted authorizing their issuance. Some examples can be found in 1 Chitty Criminal Law 64-64a (4th Amer. ed. 1841), including 22 Geo. 3, c. 58, sec. 1,

> One justice of the peace on complaint... that there is reason to suspect that stolen goods are... in any dwelling-house, out-house, garden, yard, croft, or other place or places, may by warrant... cause every such dwelling-house, etc., to be searched...

(quoted in V R. Burns, Justice of the Peace 107 (1754 1st ed; 1820 23rd ed.) The mere existence of statutes authorizing a court to issue a warrant for search of a dwelling implies the King could not adopt a statute authorizing his entry without one, and that such a statute would be contrary to Magna Charta.

Undersigned has been unable to locate a statute

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13. "Justices of Peace cannot make a warrant... for they being created by Act of Parliament have no such authority granted unto them by any Act of Parliament..." 4 Coke's Institutes, cap. 31.

authorizing the King to enter a dwelling without a warrant, much less one authorizing conviction for refusal to allow such entry. Any such statute would be contrary to the adage a man's home is his castle. The mere absence of any such statute is evidence the English Kings felt they could not adopt one consistent with Magna Charta, sec. 29.

As Lord Camden noted in Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (1765), every act of a man "bruising the grass and even treading upon the soil" is a trespass (quoted in Boyd v. United States, 116 U.S. 616, 627 (1885)), and any such statute would make an illegal act legal. The injury in such case would not occur by the law of the land, but by arbitrary will of the King.

The Early Colonial Experience

Turning to the early Colonial experience in America, Frank v. Maryland, 359 U.S. 360 (1959), overruled by Camara, undertook a historical analysis, and cited a number of the early Colonial statutes. Id. at 367, notes 5, 6, 9, 10 and 11. Undersigned has been unable to read all of these, but none appear to allow a stiff criminal sanction for refusal to allow entry into a home. Had such a statute existed, the Court would surely have noted it, for the Court's upholding of the conviction was predicated upon (1) the sanction was but forfeiture of $20, and (2) the schema explicitly stated that if the inspector found violations, no criminal prosecution could result.

Based upon the absence of any record of a court ever having imposed a criminal sanction for refusal to allow entry into the home without a warrant, such would appear impermissible after the Revolution. We will now turn to the American experience subsequent to such time.

After the Revolution: A Refusal of a Home Occupant to Permit Warrantless Entry Cannot be Criminally Sanctionable.

U.S. Constitution, Amend. IV, states,

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[14]

Obviously, if the food inspector must obtain a warrant before searching, Ms. Hill is more secure against unreasonable searches than if he need not. However, it must be borne in mind that here no search occurred, that is, the Hills refused to allow one, and the inspector did not forcibly engage in one, but instead brought a criminal charge. Thus, the question of whether "the search" was "reasonable" is not precisely before us, as there was no search.

While the inspector helped himself to entry into the curtilage, he didn't as a result find anything, such as impure food, which led to an impure food charge, with the Hills moving to suppress, arguing the "search" was illegal. Had he met the Hills at the entry, and demanded entry at that point, and the Hills refused thereat, they still would have been charged with "refusal". The charge of "refuse to permit entry" implies no "entry" occurred, and

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14. This provision is incorporated against the states by U.S. Const., Amend XIV, due process clause.

that is this case.

Similarly, this Court has often held that searches and seizures without a warrant are per se unreasonable, subject to narrow and limited exceptions, and that the burden of adducing an exception is on the government. Again, these principles are directly applicable when a search occurs. Thus, if the Hills had not refused, but given "consent" to search, and Williams searched, and then as a result brought an impure food charge, then the question might arise whether such search was "reasonable," and the above principles would be directly applicable. Ms. Hill contends the narrow question isn't, if she had allowed the search and one occurred, whether such would have been reasonable, but simply whether the state can impose a criminal sanction for refusing to allow it.

Thus, the Court of Appeals veered off course because its opinion is predicated on the assumption a search occurred, and it seeks to analyze whether a search that never occurred was "reasonable" under New York v. Burger. The controlling precedent is Camara where a housing inspector demanded entry into the unit which Camara had rented for commercial use only, after complaint he was living in the back. Camara said the inspector needed a search warrant, and the City prosecuted him. He filed for a writ of prohibition in the superior court.

This Court stated that the basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Id. at 528. It then analyzed Frank, and stated that "only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search." Id. at 532. The Court concluded that Camara "had a constitutional right to insist that the inspectors obtain a warrant to search and

that appellant may not constitutionally be convicted for refusing to consent to the inspection." Id. at 540.

Under a Narrow Reading of Camara This Court Need Not Decide Whether Burger Applies.

The Court of Appeals opined that whether Ms. Hill had a right to refuse entry was a vector function of (1) whether Burger applied to a private residence from which a commercial operation was conducted, and (2) and whether, had she consented and a warrantless entry occurred, such would have been reasonable under Burger. They opined it did apply, and a search would have been reasonable, and hence affirmed. Ms. Hill contends the Court need not decide these issues because Camara, read narrowly, constitutes the application in the context of a sought for search of the more generalized due process principle that government may not affect the individual's property or liberty without judicial review, and that due process is violated when the argument over the right to search is made during a criminal prosecution.

The leading case is Ex Parte Young, 209 U.S. 123 (1907), and undersigned will demonstrate how Camara ties into it. In Young, the state had authorized an agency to set railroad rates with no right of a appeal to a court. It imposed a criminal sanction for operating at higher rates than authorized. The officers believed the rates were so low as to be confiscatory of property but were afraid to sell tickets at higher rates for fear of criminal prosecution.

The stockholders thus brought an action for injunction against prosecution, and complained "because [the railroad] is only allowed a hearing upon the claim of the unconstitutionality of the acts... at the risk, if mistaken, of being subjected to such enormous penalties..." Id. at 145.

The Court noted,

> The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts... for the purpose of testing its validity.

Id. at 146. The Court stated,

> A law which indirectly accomplishes a like result [the legislature making the commission conclusive of the sufficiency of the rates] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Id. at 147.

Thus, the issue is whether with Williams arguing that he can enter without a warrant, and the Hills arguing that he can't, the state accords the Hills due process when Williams in effect responds, "O.K., We disagree. I will obtain a criminal warrant, and we will argue in front of the judge who is right, and if you are wrong, then you can go to jail for 12 months.". Under the schema, the only way the Hills can obtain a judicial determination whether the sought for search is reasonable, is to defy Williams, and then go to jail if the court upholds him.

Arguably, if the state had required of the Hills a license, and they had applied for one, agreeing to submit to warrantless searches, and agreeing that if they refused one, then they could be prosecuted, one might argue that prosecution was their "choice" and not problematic. Nor is the Hills' position necessarily incompatible with the view that the state could impose a license, and then subject them to revocation of license for refusal to submit to warrantless inspection, that is, a civil sanction. See, e.g., Rush v. Obledo, 756 F.2d 713, 714 n. 2 (9th Cir. 1985), if licensed day care providers refused "to admit such officer... [such] shall constitute cause for revocation or suspension of the family day care license."; Wyman v. James, 400 U.S. 309 (1970), Social Services could condition receipt of welfare on allowing warrantless entry into the home.

The only legal notice the Hills had was the decision of another circuit court judge that the Commissioner needed a warrant to inspect a virtually identical goat cheese farm in Albemarle County, Solem v. Courter, 57 Va. Cir. 143 (2001), which the Hills' they relied on. The effect is the Hills are given a hearing before Judge Parker, at which he concludes he disagrees with Judge Peatross, and his next words are, "Now let's set this case for trial," that is, "Now let's see if you go to jail for your mistaken judgment over your Fourth Amendment rights."

There remains to show Camara has its roots in Young. As noted, the Camara Court said it was only by risking a criminal conviction that the occupant could challenge the inspector's decision to search, words that echo Young. Second, the Court cites Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946), where the Court noted that where subpoenas were issued, the subject still could seek judicial review of the subpoena before he could be compelled to comply: "The Administrator is authorized to enter and inspect, but the Act makes his

right to do so subject in all cases to judicial supervision." Id. at 217. See also cited that precedent at p. 544, n. 5, noting, "[W]hile the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenad party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."

That note also cited United States v. Morton Salt, 338 U.S. 632 (1949), which noted that the Court was not deciding "what the consequences would be if no chance is given for a test of reasonable objections to such an order. Cf. Oklahoma Operating Co. v. Love, 242 U.S. 331." Id. at 585. Oklahoma Operating Co. v. Love, 252 U.S. 331, 336 (1919) states,

> By boldly violating an order [Williams's order] a party against whom it was directed [the Hills] may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission [the general district court] by showing that the order violated was unfair, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal [to Judge Parker]... But the penalties... if he pursues this course without success, are such as might well deter even the boldest and most confident[,]

citing Ex Parte Young. Where there is a gray area over the right to enter without warrant, it is fundamentally unfair to say the citizen can only test the administrator's

decision in defense of a prosecution. [15]

If the State's Ability to Punish is Coterminous with Whether a Warrantless Search would be Reasonable, the Court of Appeals Misapplied Burger.

If whether Ms. Hill can be punished is a vector function of whether Burger applies to homes, and, if so, whether its requirements are satisfied, Ms. Hill still disagrees with the Court of Appeals's resolution of those issues. That Court noted "'legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment[,]'" quoting from Donovan v. Dewey, 452 U.S. 594, 598 (1981). The Hills' farm is not "commercial property" within this precedent, but is instead a residence, for the following reasons: as noted, the companion cases of Camara and See are just that, companion cases.

If this Court had wanted to, it could have merged the two into a single opinion. The reason it did not issue such is because it believed a distinction lay between operating a commercial enterprise in a space in which one lived (Camara) and operating one in a space in which one did not live (See). As noted in See,

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15. It is because the Hills believe it is not necessary to address whether, had they acceded to a warrantless search and one occurred, such would be reasonable, they also filed a sec. 1983 action to enjoin future searches under sec. 3.1-399. Hill v. Courter, 344 F.Supp.2d 484 (E.D.Va. 2004). Judge Ellis felt the issues under 3.1-399 were sufficiently intertwined with the sanctions issue that Younger v. Harris compelled abstention. Notwithstanding his published decision and order, undersigned filed a timely petition for rehearing which he has never ruled on.

> In Camara, we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. The only question which this case presents is whether Camara applies to similar inspections of commercial structures which are not used as private residences.

Id. at 542. Since the "personal residence" in Camara was a personal residence employed in a commercial enterprise, it follows that "commercial property" is "commercial structures which are not used as private residences." The result is that Donovan and Burger (which followed the definitions of See and Donovan at p. 699) simply are not applicable. This is a "dwelling" case, not a "commercial property" case.

And even if they were applicable, their requirements have not been met. The Hills asserted below, and the Commonwealth has never disputed, the Commonwealth does not require a license to sell the cheese. The Court of Appeals claimed that the Hills "'cannot help but be aware that [their] property will be subject to periodic inspections undertaken for specific purposes.'" Hill v. Com., 47 Va.App. 450, 624 S.E.2d 670, quoting from Burger. Under sec. 3.1-399 they have no awareness that they will be inspected at all, every 2 years, or some other figure. The inspections are entirely at the discretion of the field officer who may inspect as often or not as he wishes.

The Court of Appeals said such statute imposed a "duty" to inspect, 47 Va.App. 452, 624 S.E.2d 671, but its plain language merely authorizes him to inspect. There is none of the language of Donovan requiring periodic inspections: "federal mine inspectors are to inspect underground mines at least four times per year." Id. at

596. There simply is no "regular administrative scheme." 47 Va.App. 453, 624 S.E.2d 672.

The Court of Appeals says food and dairy have long been regulated, back to 1908. 47 Va.App. at 451, 624 S.E.2d 671. Aside from the fact regulation since 1908 is not "long" given that food has been around since humankind existed, the very act he cites focuses on "creameries," "factories," etc., areas that reasonable people would not consider "homes."

It said that "'unannounced, even frequent, inspections are essential...'" 47 Va.App. 455, 624 S.E.2d 673, quoting from United States v. Biswell, 406 U.S. 311 (1972). The difficulty is that Williams testified "on a smaller operation or a home operation we have actually set up appointments." (App. 83). He "tries" to inspect Mom and Pop enterprises once a year (App. 89), and from the 2001 inspection to the attempted 5/03 inspection, there was none (App. 89-90). Williams's supervisor notified him of the operation in March 2000, and he waited until August to act (App. 84-85).

And such court argues "[e]vidence of misbranding and adulteration could easily be concealed if advance notice of inspection was given." 47 Va.App. 455, 624 S.E.2d 673. Since the Hills openly sell at the public market, it is impossible to "conceal" misbranding - all one has to do is buy a parcel, and examine its contents to see if the contents and label match. It is further impossible to conceal "adulteration" for the same reasons. And the legislature has never required the inspections be unannounced.

The Court of Appeals says the earlier inspections were limited, Id.., and that the "record" establishes a "process" that is an acceptable alternative to a warrant, Id., but the test is not what has been done under the statute, but what can be done. Williams can inspect in the morning, be totally satisfied, and then come back that afternoon with no reason to believe there is a problem.

And the Court cites Camara's citing of "emergency" cases, 47 Va.App. 457, 624 S.E.2d 673-74, and says Camara did not involve "immediate" needs, intimating this is an "emergency case", when nothing suggests it is, and the Commonwealth has never argued for the emergency exception.

The Court of Appeals says two years earlier the inspector "found the absence of sanitation strips and an inadequate pasteurizer, both of which could be masked by a temporary fix if notice was required." 47 Va.App. 455, 624 S.E.2d 673. Despite constant opportunities to make lab tests of the cheese sold at the market, the Commissioner has never complained of its sanitariness. Regarding the "inadequate pasteurizer," V.C. sec. 3.1-398 confers on the Board of Agriculture and Consumer Services authority to make regulations, and pursuant to such it has adopted 2 VAC 5-600-10.C. which "adopts by reference" "[21 C.F.R.] sec. 1240.61, Mandatory pasteurization for all milk and milk products in final package form intended for direct human consumption." Such in turn states, "(a) No person shall cause to be delivered into interstate commerce... any milk or milk product.. unless the product has been pasteurized... (b).. [T]he terms 'pasteurized' shall mean the process of heating... in properly designed and operated equipment." Mr. Williams wants the Hills to obtain this "properly designed equipment," but the Hills will not because (1) they don't traffic in interstate commerce, and hence are not required to obtain it, and (2) under such equipment, they would have to milk a goat for one day, save it, milk a goat a second day, save it, etc., up to five days in order to generate a large enough volume to fit into the machine, at which point the milk is stale and the cheese of poor quality. As regards "sanitation strips," the Commonwealth has never fingered what law requires them, and this is but a "law" that Williams has made up. A very reason for the war-

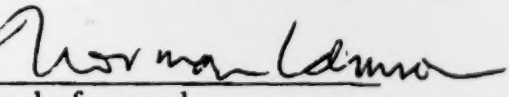
rant process is to preclude petty tyrants such as Williams from declaring their own "laws."

CONCLUSION

The Commonwealth may not punish Ms. Hill for refusing to allow a food inspector warrantless entry into her home, or to say the same thing, into buildings in the curtilage of her home, under the Fourth Amendment as incorporated by the Due Process Clause. The conviction should be reversed, and the Summons dismissed.

Respectfully submitted,

MARY S. VANDERWOUDE HILL

By 

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APPENDIX

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(2)

Supreme Court, U.S.
FILED

061394 FEB 15 2007

OFFICE OF THE CLERK

Docket Number

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

MARY S. VANDERWOUDE HILL
and
JAMES J. HILL,
Petitioners

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 17th day of November, 2006.

Mary S. Vanderwoude Hill, et. al., Appellants,

against Record No. 060608
Court of Appeals No. 1133-04-4

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On Consideration of the petition of Mary S. Vanderwoude Hill to set aside the judgment rendered herein on the 7th day of September, 2006 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy,

Teste: Patricia L. Harrington,
Clerk

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 23rd day of October, 2006.

Mary S. Vanderwoude Hill, et. al., Appellants,

against Record No. 060608
Court of Appeals No. 1133-04-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

On September 7, 2006 this Court entered an order refusing the petition for appeal filed in the above case. Thereafter, on October 3, 2006, came counsel for the appellants and filed a motion to dismiss the prosecution against appellant James J. Hill. In support whereof, counsel submitted a death certificate showing that James J. Hill died on August 29, 2006.

Upon consideration whereof the Court is of opinion that the death of this appellant pending appeal abated the prosecution against him ab initio. Accordingly, it is ordered that the warrant against James J. Hill be dismissed and that his estate be absolved of responsibility for paying any costs assessed against him in this case.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Fauquier County.

A copy,

Teste:
Patricia L. Harrington,
Clerk
By: [signed]
Deputy Clerk

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of September, 2006.

Mary S. Vanderwoude Hill, et. al., Appellants,

against Record No. 060608
Court of Appeals NO. 1133-04-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A copy,

Teste:
Patricia L. Harrington,
Clerk
By: [signed]
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday, the 24th day of February, 2006.

Mary S. Vanderwoude Hill and
James J. Hill, Appellants,

against Record No. 113-04-4
Circuit Court Nos. CR03-485 and
CR03-486

Commonwealth of Virginia,
Appellee.

Upon a Petition for Rehearing
Before Chief Judge Fitzpatrick, Judge Benton and Senior Judge Bumgardner

On Consideration of the petition of the appellants to set aside the judgment rendered herein on the 17th day of January, 2006 and grant a rehearing thereof, the said petition is denied.

A copy,
Teste:
Cynthia L. McCoy, Clerk
By: [signed]
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 24th day of February, 2006.

Mary S. Vanderwoude Hill and
James J. Hill, Appellants,

against Record No. 113-04-4
Circuit Court Nos. CR03-485 and
CR03-486

Commonwealth of Virginia,
Appellee.

Upon a Petition for Rehearing En Banc
Before Chief Judge Fitzpatrick, Judges Benton, Elder, Frank, Humphreys, Clements, Felton, Kelsey, McClanahan and Haley

On Consideration of the petition of the appellants to set aside the judgment rendered herein on the 17th day of January, 2006 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code sec. 17.1-402(D).

A copy,
Teste:
Cynthia L. McCoy, Clerk
By: [signed]
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday, the 17th day of January, 2006.

Mary S. Vanderwoude Hill and
James J. Hill, Appellants,

against Record No. 113-04-4
Circuit Court Nos. CR03-485 and
CR03-486

Commonwealth of Virginia,
Appellee.

From the Circuit Court of
Fauquier County

Before Chief Judge Fitzpatrick, Judge Benton and Senior Judge Bumgardner*

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

This order shall be certified to the trial court.

---

*Judge Bumgardner participated in the hearing and decision of this case prior to the effective date of his retirement on December 31, 2005.

A copy,
Teste:
Cynthia L. McCoy, Clerk
By: [signed]
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judge Benton and Retired Judge Bumgardner*
Argued at Richmond, Virginia

PUBLISHED

MARY S. VANDERWOUDE HILL
AND JAMES J. HILL

v. Record No. 113-04-4
OPINION BY
JUDGE JAMES
W. BENTON,
JR.
JANUARY 17,
2006

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF FAUQUIER COUNTY
James H. Chamblin, Judge

Norman Lamson for appellants.

John H. McLees, Senior Assistant Attorney General (Judith Williams Jagdman, Attorney General, on brief), for appellee.

A jury convicted Mary S. Vanderwoude Hill and her husband, James J. Hill, of a misdemeanor for refusing to submit to a warrantless inspection of their goat cheese manufacturing facilities in violation of Code sec.

3.1-388(e). The Hills contend that the Fourth Amendment bars warrantless searches of premises operated by "homeowners and occupants of a farm not required by law to obtain a license to sell... goat cheese made thereon." We hold that the warrantless search falls within the exception for closely regulated industries and that the building where the Hills make their cheese within the curtilage of their home is subject to the administrative inspection. We, therefore, affirm the convictions.

---

*Judge Bumgardner participated in the hearing and decision of this case prior to the effective date of his retirement on December 31, 2005.

I.

Since 1994, Mary and James Hill have owned and operated a 200 acre farm in Fauquier County, upon which they raise goats and other livestock. From early spring through late October, Mary Hill makes approximately nine pounds of goat cheese each week from the milk they collect from their goats. She stores the cheese at the farm and sells it at a farmers' market.

Gerald W. Williams, a food safety specialist employed by the Virginia Department of Agriculture and Consumer Services, attempted to conduct a sanitary inspection of the Hills' goat cheese facilities on August 2, 2000. Pursuant to the Department's standard procedure, Williams arrived at the farm unannounced, displayed his credentials, and explained the purpose of his visit. Williams also provided the Hills with his business card and information about Virginia's food laws. Though Williams attempted to explain the law that permitted his inspection, the Hills refused his inspection.

A month later, Williams visited the farm after having made an appointment with the Hills and their attorney.

When he arrived at the farm, he displayed his badge to the Hills and their attorney. Without hindrance, Williams inspected what he described to be "a small operation," approximately ninety feet from the Hills' residence, in which the Hills milk their goats and make goat cheese. He observed two objectionable conditions: an inadequate pasteurizer and the absence of sanitation test strips. Before leaving, Williams took samples of the cheese and gave the Hills an inspection sheet that noted the objectionable conditions and identified the samples he took. Williams and both Hills signed the inspection sheet.

Williams next arrived for an inspection in October 2001. He again presented his badge to the Hills and announced he was there for a routine inspection. During the inspection, Williams observed four objectionable conditions: an inadequate pasteurizer, no daily records of the aging of the hard cheeses, no records for the soft cheeses, and incorrect labels on the finished product. At the conclusion of his inspection, he again gave the Hills his inspection report. Between September 2000 and April 2003, Williams visited the farm four or five times, generally at 9:00 a.m.

In April 2003, Joseph William Buchanan, another food safety specialist, visited a farmer's market and found Ms. Hill selling her goat cheese from a stall. He read the informational articles she had posted about the farm, talked with her about the cheese, purchased a block of goat cheese, and took a business card. Buchanan later froze the cheese, shipped it to his office in Richmond to be tested, and submitted with the cheese a report of his visit to the farmer's market.

A month later, when Williams went to the farm to conduct an unannounced inspection, the Hills informed him that he was trespassing on private property and ordered him to leave. After Williams explained that the Virginia food laws authorized his entry and inspection

during normal hours of operation, the Hills agreed to allow Williams to conduct an inspection on June 4, 2003. Before the day of his scheduled appointment, the Hills telephoned Williams and told him that he would need a warrant to enter the farm.

Williams returned to the farm unannounced on July 9, 2003. The Hills informed him that school children were coming to tour the farm, said they were "refusing his inspection," and told him to leave. Following this event, Williams appeared before a magistrate, who issued summonses against Mary and James Hill for "refusing to permit the entry of the Commissioner's duly authorized agents to [their] goat cheese manufacturing, processing and/or storage facility for the purpose of making an inspection... in violation of [Code sec.] 3.1-388(e)."

A judge of the general district court convicted the Hills, sentenced them to thirty days in jail with all thirty days suspended, put them on probation for twelve months, and fined each of them $250. The Hills appealed to the circuit court. Before trial, the circuit court judge denied their motion to dismiss the proceeding, ruling that the Fourth Amendment did not bar the warrantless inspections of their goat cheese manufacturing facilities. Following the presentation of evidence, the jury convicted the Hills of the misdemeanor and fined them $100 each. The Hills appeal these convictions.[n. 1]

[n. 1] After filing this appeal, the Hills also filed a civil action in the District Court for the Eastern District of Virginia against the Commissioner of Agriculture and Consumer Services, seeking injunctive and declaratory relief under 42 U.S.C. sec. 1983. Hill v. Courter, 344 F.Supp.2d 434 (E.D. Va. 2004). The Hills argued that Code sec. 3.1-399 is unconstitutional as applied to them because the law authorizes warrantless searches of their

home and farm buildings in violation of their Fourth Amendment right to be free from unreasonable searches and seizures. Id. at 488-89. The district judge ruled that comity required the federal court to abstain from hearing the Hills' case because the constitutionality of the statute is the subject of this appeal. Id. at 491.

II.

The specific issue raised by the Hills is "[w]hether the Fourth Amendment allows homeowners and occupants of a farm, not required by law to obtain a license to sell their [goat] cheese made thereon, to be convicted under [Code sec.] 3.1-388(e) for refusing to submit to a warrantless inspection by a food inspector." The Hills argue that the administrative inspections violate the Fourth Amendment because they do not fall within "narrow circumstances under which a warrant is not required" and further argue that, because they make the goat cheese within the curtilage of their home, they have a greater expectation of privacy than does a commercial operation. The Commonwealth responds that the statutes reasonably provide for warrantless inspections of the goat cheese facilities because it is "a closely regulated industry" and further that the Hills cannot shield their goat cheese facilities from administrative inspections by putting their facilities in or near their home.

Administrative Inspections: Overview

The Fourth Amendment does not prohibit all government intrusions onto private property, but rather protects against unreasonable intrusions. Donovan v. Dewey, 452 U.S. 594, 599 (1981). This principle means that "[t]he Fourth Amendment generally requires [gov-

ernment agents] to secure a warrant before conducting a search." Maryland v. Dyson, 527 465, 466 (1999). This general principle, however, has some well-defined exceptions. The Supreme Court has held that "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." Donovan, 452 U.S. at 598. "[I]n certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (citation omitted).

This exception does not apply to all regulated businesses or industries.

> The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to be consider to be reasonable... This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes. An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in "closely regulated" industries... "Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise."

New York v. Burger, 482 U.S. 691, 699-700 (1987) (citations omitted). The Supreme Court explained the contours of this exception for closely regulated businesses as follows:

> Although the number of regulations certainly is a factor in the determination whether a particular business is "closely regulated," the sheer quantity of pages of statutory material is not dispositive of this question. Rather, the proper focus is on whether the "regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."

Id. at 705 n.16 (quoting Donovan, 452 U.S. at 600). The Court also noted that the duration of the regulatory scheme is a factor in this analysis, but it "declined to limit [its] consideration to the length of time during which the business... had been subject to federal regulation." Id. at 701. Rather, the Court "essentially defined [the exception] by 'the pervasiveness and regularity of the... regulation' and the effect of such regulation upon the owner's expectation of privacy." Id.. (quoting Donovan, 452 U.S. at 606-06).n.2.

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n.2. Though the court have held that certain businesses and industries are closely regulated, not all businesses and industries are. Industries found to be closely regulated are varied. See Burger, 482 U.S. 691 (auto salvage industry); Hodel v. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (coal mining industry); United States v. Biswell, 406 U.S. 311 (1972) (gun industry); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry); Shoemaker v. Handel, 795

F.2d 1136 (3rd Cir. 1986) (horse racing industry); United States v. Acklen, 690 F.2d 70 (6th Cir. 1982) (pharmacies); Marshall v. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir. 1979) (sand and gravel industry); Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978) (massage parlors); United States v. Thriftmart, Inc., 429 F.2d 1006 (9th Cir. 1970) (food warehouses regulated by the Federal Food, Drug & Cosmetic Act); United States v. Approx. 600 Sacks of Green Coffee Beans, 381 F.Supp.2d 57 (D.Puerto Rico 2005) (coffee industry). But see Marshall v. Barlow's Inc., 436 U.S. 307, 313-15 (1978) (holding that the government could not use the administrative exception to conduct warrantless searches to inspect for OSHA violations because any business could potentially violate OSHA regulations and as such the legislation was not sufficiently tailored to put businesses on notice that they were subject to warrantless searches).

The Court gave an indication in an earlier decision that each regulatory scheme must be analyzed on a case by case basis because it held that "[t]he reasonableness of a warrantless search... will depend upon the specific needs and privacy guarantees of each statute." Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978).

The Virginia Food Act

Chapter 20, Article 3 of Title 3.1 of the Code of Virginia is known as the "Virginia Food Act." Code sec. 3.1-386. This Act and other statutes in Chapter 20 ("Food and Drink Generally") provide a scheme for monitoring the preparation, manufacture, and storage of food and drink in Virginia. The food and dairy industry has long been regulated in the Commonwealth. In 1908, the general assembly established the position of the dairy and food commissioner and his office. 1908 Va. Acts, ch. 188.

That legislation authorized the commissioner or any of the commissioner's agents to enter "any creamery, factory, store, salesroom, drug store, or laboratory, or place where [the inspector] has reason to believe food or drink is made, stored, sold, or offered for sale" and to inspect the premises and goods. 1908 Va. Acts, ch. 188, sec. 6. The object of this authority was "improving the quality and creating and maintaining uniformity of the dairy products of the state." 1908 Va. Acts, ch. 188, sec. 11. Any person who "wil[l]fully hinder[ed] or obstruct[ed]" the commissioner was guilty of a misdemeanor. 1908 Va. Acts, ch. 188, sec. 9.

Since that time, the legislature has recodified and amended the Food Act. The current regulatory scheme in Chapter 20 vests all powers previously held by the dairy and food commissioner with the Commissioner of Agriculture and Consumer Services. Code sec. 3.1-361. Though the official name has changed over the years and the acts have been recodified to provide clarity, the substance of the regulations has remained the same. Compare Code sec.'s 3.1-361 to 3.1-419 with Code sec.'s 3-307 to 3-322, Code sec.'s 1154(1) to 1190 (1942), and Code sec.'s 1154(1) to 1190 (1930). The Food Act defines key terms, Code sec. 3.1-387, and references prohibited acts, see, e.g., Code sec. 3.1-388, such that any person operating an establishment where food is manufactured, packaged, or stored should be on notice as to what is regulated. Further, the Food Act confers authority on the Virginia Board of Agriculture and Consumer Services to promulgate regulations necessary to enforce the Act. Code sec. 3.1-398.

The Food Act specifically prohibits anyone from "operat[ing] a food manufacturing plant, food storage warehouse, or retail food store until it has been inspected by the Commissioner." Code sec. 3.1-398.1. Thus, while these statutes do not require a person to obtain license

from the Commissioner, they do establish a means by which all persons operating a food manufacturing plant or storage warehouse must comport with the Act before beginning their operations. The Food Act further specifies the Commissioner's ongoing duty to inspect these facilities. Code sec. 3.1-399.

The Commissioner is required to monitor for and to seize foods "which are unsound, or contain any filth, decomposed or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe." Code sec. 3.1-391. The Food Act also authorizes the Commissioner to inspect for adulterated or misbranded food and for food to which poisonous or deleterious substances have been added. Code sec.'s 3.1-395 to 3.1-397. In conducting the inspections, the Commissioner's agents may only enter "any factory, warehouse, or establishment in which foods are manufactured, processed, packed or held for introduction into commerce." Code sec. 3.1-399. Inspectors may enter such premises during "reasonable hours" to look for violations of any provisions of this Act and to collect samples for testing. Id.. If any person denies entry to an inspector to any establishment in which food is manufactured, processed, packed, or held for introduction into commerce, that individual has committed a misdemeanor. Code sec.'s 3.1-388(e), 3.1-390.

Simply put, the Food Act is long standing, comprehensive, and designed to protect a significant aspect of public health and safety; the safe production and storage of foods offered to the public for consumption. Individuals who manufacture food for public consumption have long been the targets of particular scrutiny under the Food Act, which specifies what actions are prohibited, allows injunctions to prevent violations, and prescribes penalties for those who violate the Act. Code sec.'s 3.1-388, 3.1-389, and 3.1-390. Viewed in this vein, the

Hills have been put on notice of the regulatory scheme and cannot be said to have a reasonable expectation of freedom from warrantless administrative searches. The statutes define a pervasive and regular administrative scheme that focuses on ensuring safe production of foods. See State v. McGillicuddy, 646 A.2d 354, 355 (Me. 1994) (holding that warrantless inspections are logically required in potato packing houses because the food product is wrapped there prior to being sold and because the statute's purpose is to ensure quality of the product going to consumers).

APPLICATION OF THE BURGER FACTORS TO THE FOOD ACT

In Burger, the Supreme Court identified three factors that must be satisfied before a warrantless search of a closely regulated business "will be deemed reasonable." 482 U.S. at 702. First, the government must have a substantial interest that "informs the regulatory scheme pursuant to which the search is made." Id.. Second, the warrantless inspection must be "'necessary to further [the] regulatory scheme.'" Id. at 702-03 (citation omitted). Third, the application of the inspection program must provide "'a constitutionally adequate substitute for a warrant.'" Id. at 703 (citations omitted). In other words, to satisfy this third factor, the regulatory scheme must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. Id.; see also McCauley v. Commonwealth, 17 Va.App. 150, 152, 435 S.E.2d 891, 892 (1993) (applying the Burger factors to motor carrier safety inspections).

The regulatory scheme that governs the Food Act satisfies each criterion necessary to authorize a warrant-

less inspection of the Hills' facilities pursuant to Code sec. 3.1-399. First, the Commonwealth has a significant interest in ensuring that the goat cheese, which is a food product the Hills make for commercial sale, is safe for consumption. This interest is certainly no less than New York's interest in regulating automobile junkyards, where, in Burger, the Court concluded that the state had a significant interest in eliminating automobile theft. 482 U.S. at 708. The Court found that theft posed a substantial social and economic problem for the citizens of New York, as well as of other states. Id.. The Court also found that controlling the stolen automobile market could diminish theft. Id. at 709.

The Commonwealth likewise has a substantial interest in protecting the health of its citizens by regulating its food supply. See Commonwealth v. Stratford Packing Co., Inc., 200 Va. 11, 16, 104 S.E.2d 32, 36 (1958) (holding that food acts and regulations are intended primarily to secure the general health of the public and are inherent aspects of the state's police power). "There is no doubt about the public policy of this State with respect to the manufacture and sale of food. [The Virginia Food Act] expressly make[s] it unlawful to sell or expose for sale any unhealthy, unwholesome, or adulterated food for human use." Swift & Co. v. Wells, 201 Va. 213, 221, 110 S.E.2d 203, 208 (1959). The statutes are aimed at the food industry and are intended to control the spread of illness caused by perishable foods such as cheese and other dairy products. "The importance to the state of the protection of its food supply is... a basis for regulation of the production of food." Stratford Packing, 200 Va. 16, 104 S.E.2d at 36. "Indeed, the Supreme Court of Virginia has long recognized that it is 'inherent in the plenary power [of] the state[,] which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society,' to regulate the food and drink industry." McClellan v.

Commonwealth, 39 Va.App. 759, 767, 576 S.E.2d 785, 789 (2003) (quoting Stratford Packing Co., 200 Va. at 16, 104 S.E.2d at 36).

Second, the fundamental purpose of this regulatory scheme can only be furthered by unannounced inspections. In upholding warrantless administrative inspections in another context, the Supreme Court noted that, "if inspection is to serve as a credible deterrent, unannounced, even frequent, inspections are essential... [T]he prerequisite of a warrant could easily frustrate inspection and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." United States v. Biswell, 406 U.S. 311, 316 (1972). The same rationale can be extrapolated to the Food Act. The health and safety concerns that apply to the food industry are significant. Given the size and variety of food manufacturing facilities in Virginia, the potential for contaminated food to enter the market is tremendous. Evidence of misbranding and adulteration could easily be concealed if advance notice of an inspection was given. In this case, two years before the Hills barred the inspector, he found the absence of sanitation strips and an inadequate pasteurizer, both of which could be masked by a temporary fix if notice was required. The element of surprise inherent in warrantless inspections is necessary to ensure that the proper standards are met and that the food supply remains safe.

Third, the regulations provide the owner of these establishments with a constitutionally adequate substitute for a warrant. Burger, 482 U.S. at 711. Here the owners were informed that Virginia law authorized the inspections. Inspector Williams presented his credentials and provided the Hills with a copy of the food law authorizing his inspection and detailing the Hills' responsibilities. Moreover, the earlier inspections were limited as to time,

place, and scope and were consistent with Code sec. 3.1-399, which provides that the inspectors may only enter during reasonable hours and may only inspect places where the food or drink is manufactured, processed, packaged, stored, or sold. Evidence showed that the inspections occurred between 9:00 a.m. and 5:00 p.m. and involved only those areas where the Hills manufactured, processed, packaged, stored, and sold their goat cheese. Thus, the record establishes processes that provide a constitutionally substitute for a warrant.

We hold that each of the Burger factors was met. Therefore, the warrantless search of this goat cheese manufacturing facility was reasonable. See Contreras v. City of Chicago, 119 F.3d 1286, 1290 (7th Cir. 1997) (applying the Burger factors to an administrative inspections scheme involving pizza restaurants); North Carolina v. Nobles, 422 S.E.2d 78, 82 (N.C. Ct. App. 1992) (applying the Burger factors to the administrative inspection of a shell fisher and noting that the "high perishability and portability" of food limits the window in which inspections will be effective).

Location of the Facilities Within the Curtilage

The Hills contend that because their goat cheese operation occurs within the curtilage of their home they have a greater expectation of privacy than does a purely commercial operation. Citing Camara v. Municipal Court, 387 U.S. 523 (1967), the Hills argue that "it is of constitutional significance that the object of the inspection is a home in which a business is being operated, as opposed to a business not occupied as a residence."

Camara involved a refusal to permit a housing inspector to enter an apartment in a private building "to make a routine annual inspection for possible violations

of the city's housing Code." 387 U.S. at 526. In holding that the Fourth Amendment barred the warrantless inspection of the residence, the Supreme Court observed that, "in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day." Id. at 539. Furthermore, the Court recognized that exceptions to the warrant requirement, while not applicable in Camara, did exist for some administrative searches.

> Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has upheld in traditionally emergency situations. See North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (seizure of unwholesome food); Jacobson v. Massachusetts, 197 U.S. 11 (compulsory smallpox vaccination); Compagnie Francaise v. Board of Health, 186 U.S. 380 (health quarantine); Kroplin v. Truax, 119 Ohio St. 610, 165 N.E. 498 (summary destruction of tubercular cattle).

Camara, 387 U.S. at 539. In other words, there are "certain carefully defined classes of cases" that Camara did not foreclose from warrantless administrative searches. 387 U.S. at 528.

Although it is true that the Camara Court barred the inspector from entering a residence without a warrant, the circumstances there did not pose immediate health and safety concerns flowing from the production of food for public consumption. As the Supreme Court later explained in Burger, it "first examined the 'unique' problem of inspections of 'closely regulated' businesses in... Colonnade Corp. v. United States, 397 U.S. 72 (1970)... [and] in United States v. Biswell, 460 U.S. 311 (1972)." Burger, 482 U.S. at 700. Though this particular exception

was not at issue in Camara, the Court there did allude to exceptions for the "seizure of unwholesome food," 387 U.S. at 539, and a narrow set of cases allowing a "search of private property without a proper consent." Id. at 538. Indeed, in cases decided after Camara, the Supreme Court held that "administrative inspections in 'closely regulated' businesses" are an "established exception to the warrant requirement." Burger, 482 U.S. at 703. See also Donovan, 452 U.S. at 599-600. Applying a standard of reasonableness, the same standard used in Camara, see 387 U.S. at 539, the Supreme Court held in Burger that a "special need" exists for warrantless administrative searches "in the context of [a closely] regulated business." 482 U.S. at 702. Simply put, Camara is not controlling here because it was not a case about a closely regulated business.

We recognize that "[t]he curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." Dow Chem. Co. v. United States, 476 U.S. 227, 235 (1986). This principle, however, must be applied with recognition of other Fourth Amendment principles.n.3

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n.3. In Griffin, 483 U.S. 868, the Supreme Court permitted the search of a probationer's home without a warrant, recognizing that it has "permitted exceptions when 'special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement impracticable.'" Id. at 873 (citation omitted). Significantly, the Court noted in Griffin that it has "held, for similar reasons, that in certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches

meet 'reasonable legislative or administrative standards.'" Id. (citing Burger, 482 U.S. at 703-03; Donovan, 452 U.S. at 602; Biswell, 406 U.S. at 316; Camara, 387 U.S. at 538.

"An expectation of privacy in commercial premises,... is different from, and indeed less than, a similar expectation in an individual's home." Burger, 482 U.S. at 700. In other words, "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes from residential property." Minnesota v. Carter, 525 U.S. 83, 90 (1998). "[A] business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977).

By producing goat cheese within the curtilage of their home for later sale to the public, the Hills made the choice to expose that area to the administrative inspection provisions of the food laws. They lessened their expectations of privacy by converting otherwise private space to an area used in their commercial enterprise, which is subject to administrative inspections. See Rush v. Obledo, 756 F.2d 713, 723 (9th Cir. 1985) ("hold[ing] that properly limited warrantless inspections of family day care homes do not offend the Fourth Amendment.").

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

Donovan, 452 U.S. at 598-99. "The businessman in a

regulated industry in effect consents to the restrictions placed upon him." Marshall, 436 U.S. at 313 (citation omitted). Thus, a person who operates a commercial enterprise that is subject to close regulation does not have an interest in being free from inspection. Donovan, 452 U.S. at 599.

In McClellan, this Court discussed the operation of a "food manufacturing plant" at a home. 39 Va.App. at 764-67, 576 S.E.2d at 787-89. There, the defendant refused to permit inspectors onto her farm to inspect her goat cheese facilities and argued that her home "was [not] a 'food manufacturing plant, food storage warehouse, or retail food store' as contemplated in Code sec. 3.1-398.1." McClellan, 39 Va.App. at 764, 576 S.E.2d at 787. We rejected those claims.

> [T]he "ordinary" use of the term "plant" encompasses any building or dwelling where such "manufacturing, packaging, labelling, or holding of human food" takes place. Accordingly, McClellan's "operation" met the definition of "food manufacturing plant" within the clear context of the statute...
>
> McClellan offered the cheese that she manufactured for sale in the Commonwealth. It is clear that the General Assembly intended the Virginia food and drink laws, enforced by the Commissioner and the Board of Agriculture, to apply to operations like McClellan's, regardless of where she manufactured the cheese and offered it for sale.

Id. at 767-68, 576 S.E.2d at 789 (emphasis added). See also Parker v. Commonwealth, 42 Va.App. 358, 387, 592 S.E. 358, 372-73 (2004) (noting "that this Court has previously held [in McClellan] that a home kitchen, similar

to Parker's, may constitute a 'food manufacturing plant' within the context of Code sec. 3.1-398.1").

"The General Assembly has charged the Commissioner and the Board of Agriculture with the duty to 'inquire carefully into the dairy and food and drink products... which are manufactured or sold, or exposed, or offered for sale in this Commonwealth.'" McClellan, 39 Va.App. at 767, 576 S.E.2d at 789 (quoting Code sec. 3.1-402). Because of the state's significant interest in protecting the public health by inspecting facilities that manufacture and store food, we must "defer to [the] legislative determination" that warrantless inspections "are essential" to promote "the 'specific enforcement needs'" of this Act. Donovan, 452 U.S. at 603 (citations omitted). We, therefore, hold that the location of the Hills' goat cheese manufacturing facility within the curtilage of their home did not create a Fourth Amendment protection against the administrative warrantless search. The search was conducted in accordance with the statute to enforce the food laws, a matter of close regulation. Accordingly, we affirm the convictions.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Thursday, the 14th day of April, 2005.

Mary S. Vanderwoude Hill and
James J. Hill, Appellants,

against Record No. 113-04-4
Circuit Court Nos. CR03-485 and
CR03-486

Commonwealth of Virginia,
Appellee.

From the Circuit Court of
Fauquier County

Before Judge Elder, Senior Judge
Willis, and Retired Judge Kulp*

A judge of this Court having determined that this petition should be granted, an appeal is hereby awarded to the petitioner from a judgment of the Circuit Court of Fauquier County dated May 13, 2004...

A copy,
Teste:
Cynthia L. McCoy, Clerk
By: [signed]
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA
V.
MARY S. VANDERWOUDE HILL CRIMINAL NO. CR03-485
JAMES J. HILL CRIMINAL NO. CR03-486

ORDER

This 8th day of April, 2004, came Michael A. Costanzo, the Assistant Commonwealth's Attorney, and Mary S. Vanderwoude Hill and James J. Hill, who each stand charged with a misdemeanor, to-wit: Refuse Inspection (Section 3.1-388(E)), appeared in court and was set to the bar.

And came also Norman Hunter Lamson, counsel for the defendants.

And counsel for the defendants having filed a Renewal of the Motion to Dismiss, the Court proceeded to hear the evidence and argument of counsel regarding said motion. The Court for the reasons stated to the record, denies said motion, exceptions noted.

On motion of counsel for the defendants for an Implied Request for Continuance, the Court proceeded to hear the evidence and argument of counsel regarding said motion. The Court for the reasons stated to the record, denies said motion, exceptions noted.

Thereupon the defendants waived arraignment on the charge and after having first consulted with and being advised by counsel entered pleas of not guilty to the charge, which pleas were tendered by each defendant in person.

The Court, then impanelled thirteen (13) qualified

jurors free from exception for the trial of the defendants, in the manner provided by law. Whereupon the Assistant Attorney for the Commonwealth and counsel for the defendants each alternately exercised their rights to strike the names of three veniremen from the panel as provided by law, and the remaining seven jurors constituting the jury for the trial of the defendants were duly sworn.

And after an opening statement by the Assistant Commonwealth Attorney and counsel for the defendants, the Court and jury heard the evidence presented by the Commonwealth and the defendants. At the conclusion of the Commonwealth's evidence, counsel for the defendants moved the Court to strike the Commonwealth's evidence on the grounds stated to the record, which motion was denied and exception noted. At the conclusion of all of the evidence, counsel for the defendants renewed his motion to strike the Commonwealth's evidence for the reasons stated to the record, which motion was denied and exception noted. After hearing the evidence, the instruction of the Court and argument of counsel, the jurors were sent to their room to consider their verdicts as to guilt or innocence. They subsequently returned their verdicts in open court, in the following words:

"We, the jury, upon consideration of all the evidence, find the defendant, Mary S. Vanderwoude Hill, guilty of the misdemeanor of refusing entry for purpose of inspection and hereby fix her punishment at: $100.00 No. Jail Time."

Leonard Gagnon
Foreman

"We, the jury, upon consideration of all of the evidence, find the defendant, James J. Hill, guilty of the misdemeanor of refusing entry for purposes of inspection

and hereby fix his punishment at: $100.00 No Jail Time."

Leonard Gagnon
Foreman

Upon the request of counsel for the defendants, the jurors were polled. After the poll of the jurors, the jurors were allowed to depart.

On motion of counsel for the defendants to vacate the verdict the Court proceeded to hear the argument of counsel regarding said motion. The court, for the reasons stated to the record, denies said motion and notes the exceptions of counsel.

On Motion of counsel for the defendants to renew his Motion to Strike the Commonwealth's evidence for the reasons stated to the record, which motion was denied and exceptions noted.

On motion of counsel for the defendants to suspend the sentence of the fine of $100.00 for each defendant, the Court proceeded to hear argument of counsel regarding said motion. It then being represented to the Court that counsel for the defendants would appeal said verdict, the Court agreed to hold the amount of said fines, upon payment, in a bond account pending said appeal.

The Court thereupon found each defendant guilty of a misdemeanor, to-wit: Refuse Inspection, in violation of Virginia Code Section 3.1-388(E).

The Court proceeded with sentencing and ascertains the punishment of the defendants to be that each be amerced a fine in the amount of $100.00, and that they each pay the costs of this prosecution in the amount of $594.00.

The defendants indicated an intention to appeal. It is ORDERED that the execution of the aforesaid sentence shall be postponed during the pendency of the appeal.

And the defendants are allowed to depart upon the

above conditions.

A copy of this order shall be forwarded to the Commonwealth's Attorney and counsel for the defendants.

ENTER this 13 day of May, 2004.

JAMES H. CHAMBLIN, JUDGE

County Court Reporters.

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA
V.
MARY S. VANDERWOUDE HILL CRIMINAL NO. CR03-485
JAMES J. HILL CRIMINAL NO. CR03-486

ORDER

This 22nd day of January, 2004, came Michael A. Costanzo, the Assistant Commonwealth's Attorney, and Mary S. Vanderwoude Hill and James J. Hill, who each stand charged with Refuse Inspection (Section 3.1-388(E)), appeared in court and was set to the bar.

And came also Norman Hunter Lamson, counsel for the defendants.

And counsel for the defendants having filed a Motion to Dismiss, the Court proceeded to hear the evidence and argument regarding said motion. The Court for the reasons as stated to the record DENIES said motion.

On motion of counsel for the defendants, it is ORDERED that these cases be continued to the 8th day of April, 2004, at 9:30 a.m. for trial with a jury, counsel for the defendant having requested a jury trial.

A copy of this order shall be forwarded to the Attorney for the Commonwealth and counsel for the defendants.

ENTER this 23 day of January, 2004.

Jeffrey W. Parker, Judge

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA
V.
MARY S. VANDERWOUDE HILL CRIMINAL NO. CR03-485
JAMES J. HILL CRIMINAL NO. CR03-486

HEARING

January 22, 2004

[Ruling by the Court on defendants' Motion to Dismiss based on U.S. Const., Amend. IV]

***

I would say, initially, that this has been interesting. It's not very often the Circuit Court is called upon to deal with constitutionality. In fact, ordinarily, my, my feeling would be, is, in fact, I've said this I think on some occasions is when you're in the wrong court, you can go ahead and make yourself right if you want, but don't expect me to rule that a Statute is, is unconstitutional. And it's, I think it's true for a number of reasons. In trial court surely it'll fall upon you to apply the law and the Statutes in cases as they present themselves. That's how I view a trial judge's role, or any judge's. And, I don't mean any disrespect to Judge Peatross. He's a, he, he has perhaps more courage than I do and he's, he's written a number of opinions and his opinion is very will written [see Solem v. Courter, 57 Va. Cir. 143 (2001), J. Peatross] and I respect greatly what he does but he perhaps ventures into areas that I would tend to fear to tread. But having said that, again typically we don't deal with these and, and for

the basis reason that we're called upon here to apply law as it's prepared and adopted by others. I think that's where our obvious success is. I will further, and having said that, I still think there are occasions in which a Circuit Court might be called upon and in fact might very well declare a Statute to be unconstitutional, even though I would be very, very hesitant to do so. There is a presumption of constitutionality in Statutes. I think perhaps Mr. Costanzo handed me something to that effect. I have notes down that it's already been marked, and the Court agree 100 percent, there's no question about the fact that that's the law. Further, if there is a question in the Statute about its constitutionality the Court should seek to come up with an application of that Statute that allows it to be constitutional. If there are two interpretations, one unconstitutional and one constitutional, the Court should adopt the constitutional interpretation of that particular Statute and I really think that's what, that's what I'm really called upon to do here in this particular case, and I think that's what the Court of Appeals has done in their, in their decision [Christine Solem and John Coles v. Commonwealth, Va. Ct. App., unpublished decision]. Appeals statutes should be strictly construed with a fact of liberty of our citizens. So that's also a general statement of the law which this Court will consider in its, in its consideration of this whole situation. Having said that, as I see the scenario, what we have here and again I've already indicated my feelings with reference to the other matters Mr. Lamson's raised and so on that basis I'm going to deny his Motions. Ah, the only real consideration for the Court here is this, this Fourth Amendment question and which really is an interesting question and I found Judge Peatross's opinion very persuasive and if that were standing alone, if all I had was his Decision, which had never been appealed, and no Statute was enacted by the General Assembly to deal with some of

the questions that were raised by Judge Peatross in that case, I would decline to grant Mr. Lamson's Motions. However, and I will say however, we have this case of Solem versus Commonwealth dealing with the same people, and the fact that they even raised Collateral Estoppel to me is just phenomenal. Here we are with that there's some justification, I was kind of curious as to how it evolved but be that as it may, we've got this case [Solem v. Commonwealth], but it's unpublished and apparently it's been appealed [to the Va. Supreme Court]. The Appeal's been denied and a Petition for Rehearing is being considered. Based on my experience petitions for rehearing, those, those rarely succeed, no, no disrespect intended, I just haven't seen it. I don't remember even reading anything at that level, maybe as an affidavit. So in any event, I have a statement that the Opinion written by the Court of Appeals in which they examined the situation and they, they've written some opinions in reference to that. I think I have to start to look at it and consider their argument just as much as I need to consider Judge Peatross's argument. Neither one of those arguments should bind now. But I can use those arguments in order to reach a decision and to apply the law as I see it. As I indicated, if the Court can apply this Statute in a fashion that would render it constitutional I have a duty to do so. And I absolutely will. And it appears to me that that's what the Court of Appeals has done in this particular case. Judge Peatross said, well, general rules are warranted, warrantless administrative searches of residences and private commercial property are presumptively unreasonable unless they are, he says, however, exception to the rule allows warrantless searches of pervasively regulated industry. Well, apparently that's what the Court of Appeals found [in Solem and Coles v. Commonwealth]. Judge Peatross didn't think they were; Court of Appeals saw it differently. Hey,

three to one, you know, he, he's outnumbered. Not only is he outnumbered, he's outranked and when the Court of Appeals tends to view it in that fashion I'm not gonna disagree with it; I'm not gonna argue with it. I don't know what's pervasively regulated and what isn't pervasively regulated but I certainly have enough in, evidence in front of me to say that they're not pervasively regulated. I think that mot... that burden would have been on the Movants and I'm certainly not convinced that they're not pervasively regulated, so I'm going to adopt a construction which uphold this Statute within the context of this Opinion. And it's interesting because Mr. Lamson's raised which I think would have to go to the ultimate trial in this case. He's just saying this inspection wasn't reasonable. And that to me goes beyond what I'm called upon here to do today. This is a Motion to Dismiss based on constitutionality. I'm not trying the overall case. What they have here in this case of Solem, I guess that's how you say the name, Solem versus Commonwealth and I will read from it: Solem and Coles were notified by the commission that they were subject to the laws and regulations applicable to food production enterprises if they chose to produce goat cheese for sale. They were notified that inspections would be performed. Therefore provided the parameters for a warrantless inspection are reasonable, a warrantless inspection upon the premises of a dairy product enterprise is permissible. It strikes me that if Commonwealth wishes to obtain a conviction in this Case they're gonna have to present evidence that complies with that language in this particular case. And Mr. Lamson has indicated, well, they haven't done that. It wasn't reasonable, they showed up, there was literally a, a food, a tour with the schools and, and they weren't told in advance, and they should have been given some information. Well, maybe. I think that's for the Court to decide in open trial of this case. Not at this, not at this

point in time, not at this juncture. And ah, so we may have to go through this exercise again, but I think at that point in time the Court can consider this because that's how the Court has upheld this particular Statute. That has to be complied with. As long as that's complied with and everything else falls in place, it's possible that these individuals could be convicted of this offense. But I'm not gonna dismiss this case right now on Motion based upon what the Court's heard and based upon the Briefs that have been filed. I'm gonna deny your Motion, Mr. Lamson, and now let's get this set.

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 11th day of August, 2004.

Mary S. Vanderwoude Hill, et. al., Appellants,

against Record No. 041097X
Court of Appeals No. 0615-04-4

Honorable Jeffrey W. Parker,
Judge, etc., et als.,
Appellees.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy,

Teste:
Patricia L. Krueger,
Clerk
By: [signed]
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 7th day of April, 2004.

In re: Mary S. Vanderwoude Hill and
James J. Hill, Petitioners

Record No. 0615-04-4

Upon a Petition for Writ of
Prohibition

Before Judge Humphreys, Senior Judges Hodges and Overton

Petitioners have filed for a writ of prohibition, which seeks to prohibit the Circuit Court of Fauquier County and the Office of the Commonwealth' Attorney of Fauquier County "from trying, convicting or taking any action in... proceedings now pending in the Fauquier County Circuit Court, upon appeal thereto from the Fauquier County General District Court." Pursuant to Code sec. 8.01-651, the petitioners also moved to stay their jury trial scheduled for April 8, 2004, pending our decision on their petition. For the reasons stated below, we dismiss the petition and deny the motion.

Background

The Hills appeared before the general district court on October 9, 2003, pursuant to summonses charging them with violating Code sec. 3.1-388(e), namely, refusing to permit inspectors to enter their "goat cheese manufacturing, processing and/or storage facility." The district court found them guilty and imposed on each a fine and suspended jail sentence.

On October 9, 2003, the Hills appealed their convictions to the circuit court. In November 2003, the Hills filed a motion in the circuit court moving to dismiss the charges. Mr. and Ms. Hill argued in their motions that the "court lacks jurisdiction to proceed because the statutes which define the crime and affix the penalty upon which the proceeding is based are inconsistent with the Fourth Amendment." Mr. and Ms. Hill also attacked the validity of the general district court's final orders. Ms. Hill contended that the "court lacks jurisdiction to proceed because its purported jurisdiction is appellate, and there was no valid final order of conviction in the general district court as its 10/9/03 order does not contain findings of conviction of any offense known to the law." ...

The trial court denied the motions and scheduled the Hills' jury trial for April 8, 2004.

In their petition, the Hills contend "[a]n appeal is not an adequate remedy because this is a criminal case, other goat cheese producers have an interest in its outcome and are in a quandary of whether they may refuse admittance without a warrant, that nature of the action involves repeated ongoing government efforts to inspect and hence raises the specter of a multiplicity of suits, and Ms. Hill has a right to make cheese thereon and sell it."

Discussion

It is well settled that the writ of prohibition does not lie to correct error, but to prevent the exercise of the jurisdiction of the court by the judge to whom it is directed, either where he has no jurisdiction at all, or is exceeding his jurisdiction. If the court or judge has jurisdiction to enter any order in the proceeding sought to be prohibited, the writ does not lie.

Grief v. Kegley, 115 Va. 552, 557, 79 S.E. 1062 (1913) (citations omitted).

Moreover, "[a] writ of prohibition is a discretionary remedy, and should not be used as a substitute for matters that properly belong in the trial court." In Re Johnston, 3 Va.App. 492, 497-98, 350 S.E.2d 681, 684 (1986).

In Parker v. Commonwealth, 42 Va.App. 358, 592 S.E.2d 358 (2004), we addressed similar jurisdiction arguments raised by Parker, who was convicted of operating a food manufacturing plant without inspection. Among other arguments presented, she contended the code section under which she was convicted was "facially unconstitutional because it violates the Fourth Amendment." Id. at 374, 592 S.E.2d at 366. Noting that "a 'jurisdictional' claim, which would render a judgment void, presupposes a matter of subject matter jurisdiction," we explained, "[a]n issue of subject matter jurisdiction, as distinguished from an issue of the exercise of subject matter jurisdiction, concerns the 'power of a court to adjudicate a specified class of cases.'" Id..(citations omitted). Accordingly, we found that "the general district court ha[d] exclusive original jurisdiction over misdemeanor criminal offenses [pursuant to] Code sec. 16.1-123.1," and "the circuit court had de novo appellate jurisdiction [pursuant to] Code sec.'s 16.1-132 and 17.1-513." Id. at 375, 592 S.E.2d 16 366 (noting that Parker did not contend that the offense occurred outside the Commonwealth or that the court otherwise lacked jurisdiction over her person).

For similar reasons, we find that the Hills' jurisdiction arguments do not support the granting of the extraordinary writ. Moreover, we find that a writ of prohibition is not the proper means by which to attack their convictions. Accordingly, we dismiss the petition for a writ of prohibition and deny the Hill' motion to stay the proceedings pending our decision. It is ordered that the

respondents shall recover of the petitioners their costs expended by them about their defense herein.

Respondent's costs:

Attorney's fee $50.00

A copy,

Teste:

Cynthia L. McCoy, Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE:

U.S. Const., Amend., IV, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

U. S. Const., Amend. XIV, "[N]or shall any state deprive any person of life, liberty, or property without due process of law..."

Magna Charta, sec. 29 (1225), "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor we will not pass upon him nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will not sell to no man, we will not deny or defer to any man either Justice or Right.

22 Geo. 3, c. 58, sec. 1, "One justice of the peace on complaint... that there is reason to suspect that stolen goods are... in any dwelling-house, out-house, garden, yard, croft, or other place or places, may by warrant... cause every such dwelling-house, etc., to be searched..."

Virginia Acts of Assembly, Ch. 285, 1940:

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. This act may be known, designated and cited as the Virginia Food Act.

Section 2. For the purpose of this act - (a) The term "commissioner" means...

Section 3. The following acts and the causing thereof within the state of Virginia are hereby prohibited...

Section 4. In addition to the remedies hereinafter provided the commissioner is hereby authorized...

Section 5. (a) Any person who knowingly violates any of the provisions of section three shall be guilty of a misdemeanor...

Section 6. Whenever the commissioner... shall find... any meat... which are unsound... the commissioner... shall forthwith condemn or destroy the same...

Section 7. It shall be the duty of each attorney for the Commonwealth...

Section 8. [minor violations]

Section 9. [may promulgate regulations]

Section 10. [when food is deemed adulterated]

Section 11. [when food is deemed misbranded]

Section 12. [required quantities]

Section 13. [regulations]

Section 14. [authority to enter and obtain samples]

Section 15. [publication of decrees]

Section 16. [severability clause].

Federal Food, Drug and Cosmetic Act, c. 675, June 25, 1938, 52 Stat. 1040,

"Section 1. This Act may be cited as the Federal Food, Drug, and Cosmetic Act [21 U.S.C. sec. 301]."

Section 201 [Definitions]

Section 301 [Prohibited Acts, including "(f) The refusal to permit entry or inspection as authorized by section 704." 21 U.S.C. sec. 331]...

Section 303 [Penalties, 21 U.S.C. sec. 333]

Section 304 [Seizure, 21 U.S.C. sec. 334]

Section 305 [Hearing before Report of Criminal Violation, 21 U.S.C. sec. 335]

Section 306 [Report of Minor Violations, 21 U.S.C. sec. 336]...

V.C. sec. 3.1-386, "This article may be known, designated and cited as the 'Virginia Food Act.'"

V.C. sec. 3.1-387, "For the purpose of this article:

(1) The term "Commissioner" means the Commissioner of Agriculture and Consumer Services...

V.C. sec. 3.1-388, "The following acts and the causing thereof within the Commonwealth are hereby prohibited:

...

(e) The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by sec. 3.1-399."

V.C. sec. 3.1-388.1, "If any person holding or offering for retail sale any meat... in packaged form affixes to such a label containing a date by which such food is to be sold, it shall be unlawful to willfully remove... the date portion of the label...

V.C. sec. 3.1-390(a), "Any person who violates any of the provisions of 3.1-388 shall be guilty of a misdemeanor and shall on conviction thereof be punished in the manner provided by law for the punishment of misdemeanors..."

V.C. sec. 3.1-391, "Whenever the Commissioner... shall find in any room, building, vehicle of transportation or other structure, any meat... which are unsound... the same being hereby declared to be a nuisance, the Commissioner... shall forthwith condemn... the same...

V.C. sec. 3.1-398, "(a) The authority to promulgate regulations is hereby vested in the Board [of Agriculture and

Consumer Services], unless specially conferred on the Commissioner...

V.C. sec. 3.1-398.1, "No person shall operate a food manufacturing plant, food storage warehouse, or retail food store until it has been inspected by the Commissioner. This section shall not apply to..."

V.C. sec. 3.1-399, "The Commissioner, acting through his duly authorized agents, shall have free access at all reasonable hours to any factory, warehouse, or establishment in which foods are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold such foods in commerce, or any store, restaurant or other place in which food is being offered for sale, for the purpose:

(1) Of inspecting such factory, warehouse, establishment, or vehicle to determine if any of the provisions of this article are being violated; and

(2) Of securing samples or specimens of any food after paying or offering to pay for such sample. It shall be the duty of the Commissioner to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of this article is being violated.

V.C. sec. 3.1-418, "Any manufacturer, dealer or person who refuses to comply upon demand with the requirements of Chapters 20 (sec. 3.1-361 et seq.)... of this title or who shall impede, obstruct, hinder or otherwise prevent or attempt to prevent any chemist, inspector or other person in the performance of his duty in connection with such chapters, shall be guilty of a misdemeanor, and, unless otherwise specified, upon conviction be fined not less than $10 nor more than $100, or be imprisoned not

more than 100 days, or both, in the discretion of the court; and such fines, less the legal costs, shall be paid into the state treasury."

V.C. sec. 18.2-12, "A misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor."

V.C. sec. 18.2-11, "The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both..."

V.C. sec. 19.2-53, "Search warrants may be issued for the search of or for specified places, things or persons, and seizure therefrom of the following things as specified in the warrant:

(1) Weapons or other objects used in the commission of crime;

(2) Articles of things the sale or possession of which is unlawful;

(3) Stolen property or the fruits of any crime;

(4) Any object... constituting evidence of the commission of crime..."

V.C. sec. 19.2-59, "No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer..."

V.C. sec. 19.2-393, "An 'inspection warrant' is an order in writing, made in the name of the Commonwealth, signed by a judge of the circuit court... and directed to a state or local official, commanding him to enter and conduct any inspection, testing or collection of samples for testing

required or authorized by state or local law or regulation... "

V.C. sec. 19.2-394, "An inspection warrant may be issued for any inspection, testing or collection of samples for testing or for any administrative search authorized by state or local law or regulation... No inspection warrant shall be issued pursuant to this chapter except upon probable cause... Probable cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting such inspection, testing or collection of samples are satisfied... or there exists probable cause to believe that there is a condition... which legally justifies such inspection... The supporting affidavit shall contain either a statement that consent to inspect... has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent..."

V.C. sec. 19.2-395, "An inspection warrant shall be effective for the time specified therein, for a period of not more than ten days...

V.C. sec. 19.2-396, "An inspection... pursuant to such warrant may not be made in the absence of the owner... unless specifically authorized... An entry pursuant to this section shall not be made forcibly, except that the issuing judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of an immediate threat to public health or safety... In the case of entry into a dwelling, prior consent must be sought and refused and notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed, unless the issuing judge finds that failure to seek consent is justified and that there is a reasonable suspicion of an immediate threat to public health or safety."

V.C. sec. 19.2-397, "Any person who willfully refuses to permit an inspection... authorized by warrant issued pursuant to this chapter shall be guilty of a class 3 misdemeanor."

21 U.S.C. sec. 374, "(a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner.., are authorized (A) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce.. or to enter any vehicle... and (B) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory..."

21 U.S.C. sec. 331, "The following acts and the causing thereof are prohibited:

(f) The refusal to permit entry or inspection as authorized by section 374 of this title."

21 U.S.C. sec. 333(a), "Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year of fined not more that $1,000, or both."

2 VAC 5-600-10.C, "Regulations from Title 21, Chapter 1, Subchapter L, Code of Federal Regulations. The Board of Agriculture and Consumer Services hereby adopts the following provisions... as regulations applicable in the enforcement of the Virginia Food Act by reference:

sec. 1240.61, Mandatory pasteurization for all milk and milk products in final package form intended for

direct human consumption."

21 C.F.R. sec. 1240.61, "(a) No person shall cause to be delivered into interstate commerce... any milk or milk product in final package form for direct human consumption unless the product has been pasteurized...

(b) [T]he terms 'pasteurized'... mean the process of heating... milk and milk products in properly designed and operated equipment..."

IN THE SUPREME COURT OFVIRGINIA

MARY S. VANDERWOUDE HILL AND
JAMES J. HILL,
Appellants

ads.

COMMONWEALTH OF VIRGINIA,
Appellee

Court of Appeals Record No.
1133-04-4
Cir. Ct. No. CR03-485 and CR03-486

APPELLANT MARY S. VANDERWOUDE HILL'S PETITION FOR REHEARING

Comes now the Appellant, Mary S. Vanderwoude Hill ("Mary"), by counsel, and for her petition for rehearing respectfully says as follows:

[Here is a statement of procedure and facts]...

The plain text of the Fourth Amendment states that no warrants shall issue but upon probable cause...

At the same time of course, such Court has noted exceptions to the warrant requirement...

In sum, the home has been the most jealously guarded area under Fourth Amendment law, the area where privacy is at its zenith. The Commonwealth has cited no authority, nor did the panel, which holds that the gov-

ernment has a right of inspection of the home when a business is conducted therefrom such that the refusal to allow warrantless inspections subjects the occupant to a criminal penalty...

Ms. Hill respectfully requests the Court to grant rehearing, and vacate the conviction herein.

MARY S. VANDERWOUDE HILL
By counsel

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902

IN THE SUPREME COURT OF VIRGINIA

MARY S. VANDERWOUDE HILL
AND JAMES J. HILL,
Appellants

ads.

COMMONWEALTH OF VIRGINIA,
Appellee

Court of Appeals Record
No. 1133-04-4
Cir. Ct. No. CR03-485 and CR03-486

APPELLANTS' PETITION FOR APPEAL

Norman Lamson
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Charlottesville, VA 22902-5135
(434) 979-8159
fax (434) 979-8152
Counsel for Appellants

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I. STATEMENT OF THE CASE
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II. ASSIGNMENT OF ERROR

The circuit court erred in denying the Hill's motion to dismiss because under the Fourth Amendment they had a right to refuse a warrantless inspection of their goat cheese farm, such that the Commonwealth cannot prosecute them for insisting on a warrant before submission to search.

III. QUESTION PRESENTED

Whether the Fourth Amendment allows homeowners and occupants of a farm, not required by law to obtain a license to sell their goats cheese made thereon, to be convicted under V.C. sec. 3.1-388(e) for refusing to submit to a warrantless inspection by a food inspector.

This question relates to the sole Assignment of Error.

IV. STATEMENT SETTING FORTH IN WHAT RESPECT THE DECISION OF THE COURT OF APPEALS INVOLVES (1) A SUBSTANTIAL CONSTITUTIONAL QUESTION AS A DETERMINATIVE ISSUE, AND (2) MATTERS OF SIGNIFICANT PRECEDENTIAL VALUE

[here follows such statement]

V. STATEMENT OF FACTS
[here follows the statement]

VI. AUTHORITIES AND ARGUMENT

[here follows the argument]

U.S. Const., Amend. IV, states, ...

(2) Judicial precedent to Camara-See...

(3) Camara-See give the homeowner a right to refuse....

Thus stood the law until the ascension of Justice White to the U.S. Supreme Court and its grant of certiorari in the companion cases of Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967)...

(4) Colonnade-Biswell-Barlow's-Donovan-Burger....

B. Even if the "pervasively regulated" industry exception to the warrant requirement applied to private homes, the panel erred in concluding the Hills are pervasively regulated....

The schema is not narrow in time, place and scope...

VII. CONCLUSION

The Hills have a privacy interest in their home and curtilage thereof. Their expectation of privacy is not reduced by the fact they make goats' cheese therein. As with the narcotics peddler, that privacy interest must yield to a warrant based on probable cause to search their home.

Since the food inspector had no warrant, they had a

right to resist [illegible] request to inspect their farm. That right means the Commonwealth may not prosecute them for refusing the inspector's request to inspect. The conviction should be reversed, and the Summons against each dismissed.

Respectfully submitted,

MARY S. VANDERWOUDE HILL
AND JAMES J. HILL

By counsel

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902...

IN THE COURT OF APPEALS
OF VIRGINIA

MARY S. VANDERWOUDE HILL AND
JAMES J. HILL,
Appellants

v.

COMMONWEALTH OF VIRGINIA,
Appellee

Court of Appeals Record No.
1133-04-4

APPELLANTS PETITION FOR REHEARING

Come now the appellants, Mary S. Vanderwoude Hill and James J. Hill, by counsel,... and for their petition for rehearing and petition for rehearing en banc, respectfully state as follows:...

I. Commonwealth may not prosecute Hills for refusal to submit to warrantless entry into their home....

II. Even if the "pervasively regulated" industry exception were applicable, the Hills may still not be prosecuted criminally, they are not pervasively regulated, and the schema is not narrow in time, place and scope....

Wherefore, the Hills pray they be granted rehearing and rehearing en banc.

MARY S. VANDERWOUDE HILL
AND JAMES J. HILL
By counsel

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902...

IN THE COURT OF APPEALS OF VIRGINIA

MARY S. VANDERWOUDE HILL,
et. als.,
Appellants
ads.
COMMONWEALTH OF VIRGINIA,
Appellee

Record No. 1133-04-4

APPELLANTS' REPLY BRIEF

Norman Lamson
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Charlottesville, VA 22902-5135
(434) 979-8159
fax (434) 979-8152
Counsel for Appellants

Come now the appellants, Mary S. Vanderwoude Hill and James J. Hill ("the Hills"), and for their Reply Brief respectfully state as follows: ...

[here follows the reply brief to the Commonwealth's brief]

The Commonwealth attempts to distinguish Camara v. Municipal Court, 387 U.S. 523 (1967) on the grounds...

The Commonwealth then argues that "[c]aselaw since Camara" changes the result, citing New York v. Burger, 482 U.S. 691 (1987), and a series of cases...

If the Court disagrees that the "pervasively regulated business" exception does not apply to homes, Vanderwoude-Hill Farm is not pervasively regulated....

If the Court believes the pervasively regulated industry exception applies to a home, and that Vanderwoude-Hill Farm is pervasively regulated, the second and third steps of the 3 step Burger test are not met....

Other Commonwealth authorities are distinguishable....

Respectfully submitted,

MARY S. VANDERWOUDE HILL
and JAMES J. HILL
By counsel

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902...

IN THE COURT OF APPEALS OF VIRGINIA

MARY S. VANDERWOUDE HILL,
et. als.,
Appellants

ads.

COMMONWEALTH OF VIRGINIA,
Appellee

Record No. 1133-04-4

APPELLANTS' OPENING BRIEF

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902-5135
(434) 979-8159
fax (434) 979-8152
Counsel for Appellants

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I. STATEMENT OF THE CASE.
[here follows the statement of the case]

II. QUESTION PRESENTED

Whether the Fourth Amendment allows homeowners and occupants of a farm, not required by law to obtain a license to sell their goats cheese made thereon, to be convicted under V.C. sec. 3.1-388(e) for refusing to submit to a warrantless inspection by a food inspector.

This question was preserved by written pre-trial motion to dismiss, with Memorandum attached, filed November 11, 2003 (App. 7; 37).

III. STATEMENT OF FACTS.

[here follows the statement of facts]

IV. AUTHORITIES AND ARGUMENT.
U.S. Const., Amend. IV, states,
[here follows the argument]

Presumption of constitutionality of statute does not apply because schema was reenacted when Frank v. Maryland was the law....

The Hills cannot be convicted under Camara v. Municipal Court....

Subsequent decisions, involving administrative inspections of commercial premises, do not impair the vitality of Camara....

Camara and See have their roots in Ex Parte Young...

Federal decisions holding refusal convictions violative of the Fourth Amendment under the federal Food, Drug and Cosmetic Act give guidance....

Commonwealth's position constitutes a breath-taking expansion of government power.

The sought for inspection was of the home itself, or the curtilage, which is treated as the home....

History favors the Hills, and the Legislature has struck the balance that home inspections require notice....

V. CONCLUSION.

When a family farm operation makes goats' cheese, and the state does not require that they obtain a license as a condition of doing so, they have a constitutional right to refuse a warrantless inspection of their home/farm. They may not, consistently with the Fourth Amendment, be convicted for such refusal. V.C. sec. 3.1-388(e) and 3.1-390(a), which criminalize such refusal, are in derogation of the Fourth Amendment.

The motions to dismiss should have been granted, the convictions should be reversed, and the Summons dismissed.

Respectfully submitted,
MARY S. VANDERWOUDE HILL
and JAMES J. HILL
By counsel

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902...

IN THE COURT OF APPEALS OFVIRGINIA

MARY S. VANDERWOUDE HILL,
et. als.,
Appellants
ads.
COMMONWEALTH OF VIRGINIA,
Appellee

Record No. 1133-04-4

APPELLANTS' DEMAND FOR CONSIDERATION BY 3 JUDGE PANEL

Come now the appellants, Mary S. Vanderwoude Hill and James J. Hill, pursuant to VSC Rule 5A:15, by counsel, and file their demand for consideration by a 3 judge panel.

Respectfully submitted,

MARY S. VANDERWOUDE HILL
and JAMES J. HILL

By counsel

Norman Lamson
Va. Bar #19765
405 8th Street, N. E.
Charlottesville, VA 22902...

The Court says "warrantless inspections [of homes] may be allowed when there is a 'pervasively regulated industry' involved." However, the precedents it cites involved a search of a mine and a licensed liquor dealer, not a home. The U.S. Supreme Court has never applied

such exception to a home.

The Court then quotes almost verbatim, without citing, Solem v. Commonwealth, 02 Vap. UNP 1618012 (2002). But such never held Solem could be prosecuted for refusal, only that where she refused, the agents could obtain a search warrant as a basis to search her home. The prosecution was not for "refusal."

Further, assuming such exception could be applied here, reasonableness of 3.1-399 does not address whether the state may respond to a refusal with a criminal prosecution for the refusal. Camara and See have their roots in Ex Parte Young, 209 U.S. 123 (1907) and other precedents which hold that when the legislature authorizes an agency to take action which affects liberty or property, it must allow for unfettered judicial review, and when the citizen's only means to "test" the action is refuse, be prosecuted, and raise unreasonableness in defense, so that only the "hardy" and the "bold" will refuse, the statute chills judicial review because of the risk there won't be any hardy citizens and hence no judicial review. Camara/See make plain the "judicial review" must be a review that occurs before the search is sought, not after the fact. Thus, even if 3.1-399 is "reasonable," that does not mean that 3.1-388(e)/3.1-390(a) are constitutional.

Finally, even if such exception could be applied, the Parkers' operation does not meet it...

Respectfully submitted,
MARY S. VANDERWOUDE HILL and
JAMES J. HILL

By counsel

Norman Lamson
Va. Bar #19765
405 8th Street, N. E.

Charlottesville, VA 22902...

IN THE COURT OF APPEALS OF VIRGINIA

MARY S. VANDERWOUDE HILL,
et. als.,
Appellants

ads.

COMMONWEALTH OF VIRGINIA,
Appellee

Record No. 1133-04-4

APPELLANTS' PETITION FOR APPEAL

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902-5135...

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I. STATEMENT OF THE CASE.
[here follows statement of the case.]

II. QUESTIONS PRESENTED

Whether the Fourth Amendment allows homeowners and occupants of a farm, not required by law to obtain a license to sell their goats cheese made thereon, to be convicted under V.C. sec. 3.1-388(e) for refusing to submit to a warrantless inspection by a food inspector.

This question was preserved by written pre-trial motion to dismiss, with Memorandum attached, filed November 11, 2003 (R. 14, 16 & 44, 46)

III. STATEMENT OF FACTS.
[here follows statement of facts.]

IV. AUTHORITIES AND ARGUMENT.
[here follows the argument.]

U.S. Const., Amend. IV, states,...

In Camara v. Municipal Court, 387 U.S. 523 (1967), ...

V. CONCLUSION.

When a business is run from a home, and the state does not require of that homeowner he obtain a license as a condition of engaging in the business, the homeowner has a constitutional right to refuse a warrantless inspection of his home. He may not, consistently with the Fourth Amendment, be convicted for such refusal. V.C. sec. 3.1-388(e) and 3.1-390(a), which criminalize such

refusal, are in derogation of the Fourth Amendment.

The convictions should be reversed, and the Summons dismissed.

Respectfully submitted,

MARY S. VANDERWOUDE HILL and
JAMES J. HILL
By counsel

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902...

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA,
Plaintiff

v. No. _____

MARY S. VANDERWOUDE HILL,
Defendant

DEFENDANT'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

The defendant, Mary S. Vanderwoude Hill, by counsel, submits a Memorandum of Authorities in Support of her Motion to Dismiss as follows:

I. THE COURT LACKS JURISDICTION TO PROCEED BECAUSE THE STATUTES WHICH DEFINE THE CRIME AND AFFIX THE PENALTY UPON WHICH THE PROCEEDING IS BASED ARE INCONSISTENT WITH THE FOURTH AMENDMENT.

In Pine v. Commonwealth, 121 Va. 812, 820-21, 93 S.E. 652 (1917), the Court held:

Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way,... the case is at once dismissed, as there is no offense to be punished.

Va. Code sec. 3.1-388, states,...

B. VA. CODE SEC. 3.1-388(e), WHICH PUNISHES REFUSAL TO PERMIT INSPECTIONS AUTHORIZED BY SEC. 3.1-399, IS IN DEROGATION OF U.S. CONSTITUTION AMENDMENT IV, AND VA. CONST. ART. I, SEC. 10, BECAUSE

1. IT DOES NOT MEET THE REQUIREMENTS OF ADMINISTRATIVE INSPECTIONS OF COMMERCIAL PREMISES UNDER SEE V. CITY OF SEATTLE AND ITS PROGENY.

In the companion cases of Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967), the U.S. Supreme Court overruled Frank v. Maryland, 359 U.S. 360 (1959) and Ohio v. Price, 364 U.S. 263 (1960), and ruled that "administrative inspections" were "searches" for purposes of the Fourth Amendment, and hence subject to its requirements, including that ordinarily a warrant be obtained...

The schema cannot pass 4th Amendment muster under the commercial premises exception....

... the schema does not pass muster under the "commercial premises"
cases....

Comparison of the federal food inspection statute reveals deficiencies in Va. schema.

2. IF 3.1-399 IS CONSTRUED TO APPLY TO A HOME, THEN CAMARA SAYS AN INSPECTOR WHOSE ATTEMPTED INSPECTION IS REFUSED MUST OBTAIN A WARRANT, BUT THE SCHEMA HERE AUTHORIZES ONLY SEEKING A

CRIMINAL SANCTION....

The U. S. Supreme Court has never deviated from the requirement that a search of a home requires a warrant, even where a "heavily regulated industry" is run from that home....

Wherefore, defendant prays that the charge against her be dismissed with prejudice.

Respectfully submitted,

MARY VANDERWOUDE HILL
By _____
Counsel

Norman Lamson
405 8th Street, N.E.
Charlottesville, VA 22902-5135...

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA,
Plaintiff

v. No. _____

MARY S. VANDERWOUDE HILL,
Defendant

DEFENDANT'S MOTION TO DISMISS

The defendant, Mary S. Vanderwoude Hill, by counsel, moves to dismiss the charge against her that she did on July 9, 2003, refusing to permit entry of the Commissioner's duly authorized agents to your goat cheese manufacturing, processing and/or storage facility for the purpose of making an inspection in violation of Va. Code sec. 3.1-388(e) on the following grounds:

I. THE COURT LACKS JURISDICTION TO PROCEED BECAUSE THE STATUTES WHICH DEFINE THE CRIME AND AFFIX THE PENALTY UPON WHICH THE PROCEEDING IS BASED ARE INCONSISTENT WITH THE FOURTH AMENDMENT.

VA. CODE SEC. 3.1-388(e), WHICH PUNISHES REFUSAL TO PERMIT INSPECTIONS AUTHORIZED BY SEC. 3.1-399, IS IN DEROGATION OF U.S. CONSTITUTION AMENDMENT IV, AND VA. CONST. ART. I, SEC. 10, BECAUSE

1. IT DOES NOT MEET THE

REQUIREMENTS OF ADMINISTRATIVE INSPECTIONS OF COMMERCIAL PREMISES UNDER SEE V. CITY OF SEATTLE AND ITS PROGENY, AND

2. IF IT IS CONSTRUED TO APPLY TO A HOME, THE SCHEMA DOES NOT REQUIRE AN INSPECTOR WHOSE ATTEMPTED INSPECTION IS REFUSED TO OBTAIN A WARRANT AS REQUIRED BY CAMARA, BUT INSTEAD AUTHORIZES HIM TO SEEK A CRIMINAL SANCTION....

In support hereof, defendant attaches a Memorandum of Authorities.

Wherefore, defendant prays that the charge against her be dismissed with prejudice.

Respectfully submitted,

MARY VANDERWOUDE HILL

By _____
Counsel

Norman Lamson
405 8th Street, N.E.
Charlottesville, VA 22902-5135...

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA
V.
MARY S. VANDERWOUDE HILL CRIMINAL NO. CR03-485
JAMES J. HILL CRIMINAL NO. CR03-486

TRANSCRIPT OF TRIAL OF APRIL 4, 2004

BEFORE THE HONORABLE JAMES CHAMBLIN, JUDGE...

Joseph William Buchanan, having been duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination
By Mr. Costanzo:

A. And then we [the witness, Mr. Buchanan and defendant Mary Hill at their stall at the Farmer's Market, the Plains, Virginia] discussed the, the products she had which there was three samples, I believe that were sitting on the front of the stalls.

Q. Samples of what?

A. Of, of the goat cheese... And then I asked if they were, had any of them for sale.

Q. What's she tell you?

A. Yes.

Q. Did you buy a product from her?

A. Yes, I bought a block for I believe it was five dollars...

Q. Okay. Have a label on it?

A. I believe it did, yes, sir.

Q. Okay. And what did it iden-- did it identify what, what farm it came from?

A. I think it did. Yes, it did.

Q. And what was the farm?

A. The Vanderwoude Hill Farm.

Q. Provide an address for that farm?

A. I don't remember if the label did. However, their business cards were sitting right there. [witness identifies one he picked and introduced as Commonwealth's Exhibit No. 1:

JJHill 07 @Earthlink.net
540-788-9672 fax 540-788-1021
jjhill@crosslink.com
VANDERWOUDE HILL FARM
Registered Pure Bred Nubian Goats
Registered Pure Bred Cotswald Sheep
(Fleeces and Yarns)

James J. and Mary S. Hill
10768 Bristersburg Rd.
Catlett, VA 20119]

Gerald W. Williams, having been duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination
By Mr. Costanzo:

Q. Mr. Williams, you've previously been sworn, is that correct?

A. That's correct.

Q. And you are Inspector Gerald W. Williams?

A. Yes.

Q. Employed by the Virginia Department of Agricul-

ture and Consumer Services?

A. Correct.

Q. How long have you been so employed?

A. 31 years.

Q. All right. What kind of training did you have before you were hired by the Department?

A. I had a four year college degree and the I went in with the Department. We had a six month training program.

Q. Okay. Did that six month training program involve inspections of -- or any training in inspections of dairy facilities?

A. It included all types of manufacturing, retail and wholesale establishments.

Q. Would that include dairy, also?

A. Yes.

Q. Okay. And what is your position? I mean, I, I called you an inspector, what do you do for the, for the department?

A. Well, I'm a Food Safety Specialist Senior and so that, I go by and enforce the Virginia food laws in retail, manufacturing and warehousing establishments.

Q. Okay, and how do you do that? You said you enforce these laws. How do you do that?

A. By going in, making unannounced inspections, doing sanitary inspections of the farm.

Q. Does it involve goat cheese manufacturers?

A. That's one of them, that's correct.

Q. Okay. Now, you said you do unannounced, do you also set up appointments for these sorts of inspections?

A. In some cases we have with, usually on a smaller operation or a home operation we have actually set up appointments.

Q. Okay. What's your normal practice, however?

A. Normal is unannounced.

Q. Normal is unannounced?

A. That's correct.

Q. I assume you also inspect the larger, large, any larger outfits, factories, that sort of thing...

A. Correct.

Q. ... correct? Larger farmers I guess is what I meant.

A. Yes.

Q. All right. Now, Inspector Williams, you -- are familiar with VanDerWoude Hill Farm?

A. I am.

Q. Where is that located?

A. It's on Bristersburg Road in Catlett which is actually in Fauquier County.

Q. Okay. And how long have you been aware of the Vanderwoude Hill Farms?

A. Approximately four years.

Q. All right. When did you first become aware of it?

A. In August of 2000.

Q. All right. And what drew your attention to the, to the farm?

A. I was notified by my supervisor that these, that this address, that this establishment was manufacturing a, a food product.

Q. Okay, did you receive that notification prior to August, 2000?

A. Yes.

Q. Okay. When was that?

A. That notification?

Q. Yeah.

A. Actually, that would have been probably back in March of 2000.

Q. Okay. Why were you notified, why did they bother, why did they tell you?

Mr. Lamson: Your Honor, I'm going to object, that calls for opinion, it seems to me.

Mr. Costanzo: Your Honor, I'll withdraw the question.

Q. You were notified, what, what did you do when you got this notification?

A. Actually I, after that I attempted to do an inspection at this establishment.

Q. Okay. Is that -- and when did you get out there, when did you first get out to the place?

A. On August 2, 2000.

Q. All right. And that was for -- what was your purpose in going out there?

A. To conduct a sanitary inspection of the farm.

Q. All right. When you arrived did you find anybody there?

A. I found Mr. and Mrs. Hill.

Q. Did you find them to be owner operating this, the VanDerWoude Hill farms?

A. Correct.

Q. Okay. Now, do you see Mrs. VanDerWoude Hill here in the courtroom today? ***[defendant identified]

A. And did you see Mr. James Hill there that day? *** [defendant identified]

Q. Now, Inspector Williams, is there a - did you give anything to the Hills that day?

A. Yes, I did. I took a copy of the Virginia food laws, I took a pack -- a copy, actually a packet. We have a packet that consists of about eight pages of, of...

Q. Okay. Well, let me show you a couple of items and, and did you, did you give that to them?

A. I did.

Q. All right. And you left it with them.

A. That's correct.

Q. Let me hand you a couple items. If you would look at this and I believe one of them is your business card and there's a couple of other things.

A. Okay.

Q. All right. Is that a true and exact copy of, -- that was among the paper work you gave to the Hills that

day?

A. That's correct.

Q. Okay. And you, you've had a chance to review this prior to court, is that correct?

A. Yes.

Q. All right. And the top appears to be a letter, unsigned letter by R.W. Davis, is that correct?

A. That, that's the home packet, we call it.

Q. Okay. We've got a home packet, remove this, would that constitute this?

A. That's correct.

Q. Okay. And what is this?

A. This is a copy of the sections of the Virginia food laws.

Q. Okay. And did you give this to them, also?

A. I did.

Q. All right. Along with your business card. Did you also have conversations with the Hills in addition to the paperwork you gave them about their establishment?

A. Yes. I told - explained to them the purpose of my visit was to conduct an inspection of their establishment and they refused my inspection.

Q. Okay. Did you tell them it was required by law?

A. I did. I tried also announcing those, the section of the law that would apply to that and they did not want to hear that.

Q. Okay. What do you mean they did not want to hear that? How, how did they let you know that?

A. Because Mrs. Hill stated that she didn't want to hear any numbers or any sections of the law, that she knew what the Virginia Department of Agriculture was trying to do...

A. At that point, I thanked them for their time and left.

Q. Okay. What happened next, when did you next have any involvement with the Vanderwoude Hill Farm?

A. The next involvement would have been on September the 14th of 2000.

Q. Okay. Let me stop you there. That the first time you went out in August did you --- do you have a badge?

A. Yes, I do.

Q. Did you show them the badge?

A. I identified myself and showed my credentials... [package received into evidence as Commonwealth's No. 2: a form letter from the Commissioner on his letterhead, stating, "Thank you for your inquiry regarding starting a food business[,]" advising of sec. 3.1-398.1, and to which is attached "Starting Your Food Business," which includes, "For operation from a home kitchen..." and Mr. Williams's business card.]

Q. Inspector Williams, when -- you said September was the next time you got out there?

A. That's correct.

Q. Okay. September of the year 2000?

A. Yes.

Q. Did you speak with Mr. and Mrs. Hill again?

A. That's correct.

Q. What was your purpose in going out there, then?

A. Actually, through correspondence a inspection appointment had been set up with their attorney and the Hills and...

Q. Okay.

A. ... at that point I made a, on that day I visited the farm to do an inspection.

Q. All right, you were out there to conduct an inspection?

A. That's correct.

Q. Were you able to conduct an inspection that day?

A. I was...

Q. What are you looking for when you go, when you, when you do an inspect-- an inspection?

A. Basically it's a sanitary-type inspection. I'd be

looking for evidence of insects, rodents, dirty equipment, proper equipment for the use of what you're manufacturing, plumb...

Q. Okay.

A. ... plumbing issues, that type of overall sanitation.

Q. Okay. Do you take samples of the, of the products that are being made?

A. Yes, we do...

Q. Did you take samples of those [the goat cheese]?

A. Yes, we did...

Q. [W]as there a pasteurizer there at this facility?

Mr. Lamson: Your Honor, I'm going to object on grounds of relevance. I don't see what relevance that has in this case.

Mr. Costanzo: Your Honor, it goes to the justification of later inspections for this witness...

[Court overrules objection]

Q. Inspector Williams, was there a pasteurizer at the facility on that September, 2000 inspection?

A. There was not, there was not an adequate pasteurizer.

Q. Okay. How long did that inspection take?

A. Approximately four to five hours....

Q. When you arrived did you, did you, did you have your badge with you?

A. I most certainly.

Q. Did you show that to them?

A. I did....

Q. Sir,. are you duly authorized by the Commissioner of Agriculture and Consumer Services to conduct these sorts of inspections?

A. I am.

Q. Okay. Now, after that September, 2000 inspection did you leave them with any kind of paperwork, did you give them any admonitions or anything like that concerning the results of your inspection?

A. Yes, I did.

Q. And what were they?

A. I left what we call an inspection sheet and that was left with the Hills where I signed and they signed and there was objectionable conditions during that inspection and documentation of the samples that I had taken.

Q. Okay. What sort of objectionable -- objectionable conditions did you find?

A. During that day there, there was no an adequate pasteurizer to properly pasteurize the, the milk product and test strips for sanitizing were not available.

Q. Okay. What happened next with regard to Vanderwoude - with regard to your contact with Vanderwoude Hill Farm, Farms?

A. I guess it went almost a year after that inspection to 10/2/01. At that point I attempted an inspection -- or actually did an inspection.

Q. Is that your practice to inspect these places at least once a year?

A. Pretty much try to do it yearly.

Q. Department practice?

A. That's correct.

Q. Okay. Did you have any contact from the September, 2000, inspection to the October, 2001, inspection, did you have any contact with the Hills or, or the farm?

A. No, I did not personally. There was correspondence with Richmond, but I did not personally.

Q. All right. Did you, you said you conducted an inspection that -- on, on October, 2001?

A. That's correct.

Q. Was that also by appointment or do you recall?

A. I believe it was.

Q. Okay. Tell the members of the jury, if you would, about your inspection then.... [here witness describes the 10/01 inspection].

Q. Okay. What happened after that with regard to

this farm again and you?

A. I guess the next correspondence I have would have been on 5/19/03 when I attempted to do an inspection.

Q. Okay. Now, let me, let me -- any other, did you have any other, you personally have any other involvement with the Vanderwoude Hill Farm prior to that, that May date that you just gave?

A. No, I did not....

Q. You got out there in May, what, what, how did you end up getting out there in May?

A. Once again, I was instructed by my supervisor to attempt an inspection.

Q. Okay. Was this an established -- was this an appointment inspection in May?

A. No, this was unannounced.

Q. Okay. When you got there what happened?

A. The Hills explained that I was trespassing, that I was on private property and that I must leave.

Q. Okay. Did you explain to them their obligations to submit to the inspection?

A. I did... Well, eventually at the end of that conversation or at the end of that day, since they would not allow an inspection they said they would agree to set up an appointment if I made an appointment with them.

Q. Okay.

A. So, I went to the car, I got my schedule book. Actually, an appointment was after we agreed among us, we did set up an appointment date for an inspection.... Inspection date was set for June the 4th of '03.

Q. Okay. Now, on the, on the four or five times that you stated you had been out to this farm about what time of day did you get out there?

A. Most of the time it was right around, arrive, would arrive around 9:00 a.m.....

Q. Is that your policy, as far as normal business hours

are concerned?

A. That's correct.

Q. And that is what, 9:00 to 5:00 or...

A. Basically 8:00 to 5:00 yes....

Q. ... Did you get out there and do an inspection on June 4th?

A. No, because I had...

Q. What happened in-between?

A. Because I had been notified by the Hills that that was not, the date was not satisfactory.

Q. Okay. Did you...

A. And then I...

Q. ... did they suggest another time you might be there?

A. No, they just stated that I was going to need a warrant and that that was not satisfactory....

Q. ... Let me direct your attention to July 9th, then, the offense date in this case. What happened on July 9th, how did you end up -- well, I guess I'm, I'm getting, I, I have a -- did you end up out, out at the Vander -- the Vanderwoude Hills Farms on July, July 9th?

A. I did...

Q. Did you find Mr. and Mrs. Hill to be there?

A. I did?

Q. What time did you get out there?

A. Approximately 9:00 a.m..

Q. 9:00 a.m.. Okay. And what was your purpose of going out there?

A. To conduct a sanitary inspection of their establishment.

Q. Okay. Was this an unannounced inspection?

A. Yes.

Q. All right. When you got there what did you find?

A. Mr. and Mrs. Hill both were at the edge of the barn and I once again identified myself, showed my credentials, told them the purpose of my visit and they

told me that I was once again trespassing, that I must remove myself from their property.... Once again they were, kept insisting that I was trespassing and that I needed a warrant and that I needed to remove myself.

Q. Okay. Did you do so?

A. At the end of the in -- at the end of that conversation I asked once again a direct question. I said, so, you are refusing my inspection? And they both said, yes, remove yourself.

Q. Did you demand to inspect the place?

A. No. I thanked them and walked away...

CROSS EXAMINATION

BY MR. LAMSON:

Q. ... [Y]our first visit was in August of 2000...

A. That's correct.

Q. And, and then you made an inspection in September of 2000?

A. That's correct.

Q. And then another one on Oct-- in October of 2001?

A. Correct.

Q. So, it was a total of two inspections that you made?

A. That's correct...

Q. And as a result of the September 2000 inspections you did not request any criminal charges, did you?

A. That's correct...

Q. You have no complaint from any person that he or she had gotten sick from eating their cheese, have you?

A. I do not...

Q. Now, the -- turning to the July 9th of 2003 attempted inspection... you told them you wanted to inspect right then and there, is that right?

A. That's correct.

Q. And did they, did they tell you, did they ask you

did you have an appointment?

A. Yes.

Q. And you said no?

A. Yes, that's correct.

Q. And did they tell you that they were busy right then?

A. I believe they said they were.

Q. Do you recall them saying that there was a bus-load of school children coming?

A. I do....

Q. And was there any specific area that you told them you wanted to inspect?

A. Yes.

Q. What, what did, what area did you say?

A. I said I was there to make an inst..., an inspection of their goat cheese operation, manufacturing operation...

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

COMMONWEALTH OF VIRGINIA
V.
MARY S. VANDERWOUDE HILL CRIMINAL NO. CR03-485
JAMES J. HILL CRIMINAL NO. CR03-486

TRANSCRIPT OF HEARING ON MOTION TO DISMISS OF JANUARY 22, 2004

BEFORE THE HONORABLE JEFFREY W. PARKER, JUDGE...

Mary S. Vanderwoude Hill, having been duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination
By Mr. Lamson:

A. This [referring to photograph] is the entrance to the driveway on the road.

Q. Is that a no trespassing sign?

A. That's a no trespassing sign on both sides of the fence.

Q. And is that how it was on July 9th?

A. That's right....

Q. Are you required to keep any books? For the Commissioner?

A. For tax purposes, yes.

Q. Anything besides books for tax purposes?

A. No. State or federal level?

Q. Pardon me.

A. You, you mean for, for the State of Virginia?

Q. Yes.

A. No....

Q. Tell the Court what happened on July 9th of 2003.

A. We were expecting a school to come to show how to make soft cheese and they were supposed to drive in and, on a bus. All of a sudden I see a drive, car drive in and it were the inspectors and I asked them if they had made an appointment but I wasn't listening and they said no and I said, well, you should have made an appointment and we can't inspect it today, or have you inspect today because we're busy and he said it has to be done today and I didn't ask him why today but they obviously had a reason and then I refused them entrance and my husband came out and told them that they were trespassing because they didn't have an appointment and so they finally left....

Q. Is there a reason that you changed from giving them permission on the two prior occasions to this occasion, July 9, 2003?

A. We have no objection about, for an inspection at all. As a matter of fact, we welcome them, only with an appointment. We are, as you know, a little older [Ms. Hill was 72 and Mr. Hill was 78], more mature and my husband is not always home and I do not like to have anybody just driving in the driveway when I'm home by myself and I am, I'm fearful of these inspectors because it's just not fair to us to go through this 3 1/2 hour inspection....

Q. Did anybody have a search warrant at any time?

A. No.

Q. And did anybody have an inspection warrant?

A. No...

Q. Miss, Miss Hill, did you, at, on July 9th, 2003 were you aware of Judge Peatross's Opinion in Solem versus Courter?

A. Yes....

Q. Had you read it before July 9th, 2003?

A. Yes, yes.

Q. And did your reading... did that play a role in what you did on July 9th, 2003?

A. Yes, it did. Because we really insist on having an appointment and so therefore that would be, if there would be a warrant served, we would know that they were coming...

Q. Has any Judge ever told you that you have to let these people in without a warrant?

A. No....

James J. Hill, having been
duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination
By Mr. Lamson:

Q. ... And had you read Judge Peatross's Decision before July 9th?

A. Yes.

Q. Did that play a factor in what you did on July 9th?

A. Yes, we felt we were within our rights....

SUMMONS

Fauquier County...

TO THE ACCUSED:

You are hereby commanded to appear before this Court on __ to answer the charge that on or about July 9, 2003... within this ... County you did unlawfully

Refusing to permit entry of the Commissioner's duly authorized agents to your goat cheese manufacturing, processing and/or storage facility for the purpose of making an inspection

in violation of Section 3.1-338(e), Code of Virginia....

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of: G. W. Williams, Inspector, VA Dept. of Agri & Consumer Services. Magistrate J.H. Bush.

Mary S. Vanderwoude Hill, Owner
Vanderwoude Hill Farm
10768 Bristersburg Rd.
Catlett, VA 20119-2205...

SUMMONS
CLASS 1 MISDEMEANOR...

60

(3)

Supreme Court, U.S.
FILED
JUL 6 - 200?
OFFICE OF THE CLERK

Docket Number 06-1394

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

MARY S. VANDERWOUDE HILL
and
JAMES J. HILL,
Petitioners

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR THE REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

Norman Lamson
Counsel of record for
petitioner Mary S.
Vanderwoude Hill
405 8th Street, N. E.
Charlottesville, VA 22902
(434) 979-8159

The Commonwealth of Virginia prosecuted Mary S. Vanderwoude Hill and her husband James J. Hill (the latter dying pending appeal) for the putative "crime" of refusing in the front yard of their home to allow a Virginia Department of Agriculture and Consumer Services ("VDACS") food inspector into a milking parlor and other buildings in the curtilage of their home, and into the home itself, in violation of Va. Code sec. 3.1-388(e), when he had no warrant, whether a traditional criminal search warrant, administrative inspection warrant, or otherwise, for their home or them. The Summons identifies such as a Class I misdemeanor, which under Virginia law carries a punishment of jail up to twelve months. The undisputed reason for the inspector's wanting to inspect is that the Hills make goats' cheese on their farm from their goats which they then transport a short distance to a nearby farmers' market where they sell it to the public on week-ends from spring to fall.

VDACS claims they not only can buy the cheese at the market and inspect it, which power Ms. Hill does not dispute, but that such activity opens her home itself to warrantless inspections under Va. Code sec. 3.1-399, stating the Commissioner shall have free access "at all reasonable hours" to inspect to determine if the Virginia Food Act is being violated. The statute imposes no limits on the numbers of times the inspector may inspect or the numbers of inspectors who may participate. No law required the Hills to have a license, or imposed any detailed regulatory scheme upon them.

The effect of this Honorable Court's denial of certiorari is that government at all levels will be enabled to compel by threat of criminal prosecution warrantless entry into any home in America because the owner made a spoonful of food therein for public sale. Inspectors can tell thousands of ladies standing at the door of their

home, who have baked cakes for a church bake sale, or an African-American woman who occasionally makes dinners of chittlings, collared greens and fried chicken in her kitchen for sale, that they must let the inspector in, and the Fourth Amendment does not help them. The inspector can warn an adolescent girl at the threshold to the most private place in America that she must let him in because she holds girl scout cookies therein for sale.

The inspector can appear without advance notice or warning that he is coming, and indeed he can be accompanied by a deputy sheriff as this inspector was on his first visit to the Hills' farm. The deputy can be armed, and his presence with the inspector can send the message, "You better submit to the inspector. No, he doesn't need a warrant. This is not the America you thought it was. Your submitting will be less painful than the criminal prosecution which will follow if you don't submit." And indeed, he can even, as this inspector did, flagrantly ignore the curtilage, prominently posted "No Trespassing," enter into the curtilage, and then make his demand after warrantless entry therein. He need not stand at the curtilage and demand entry at that point. Thus, there is the insult of warrantless entry into the curtilage coupled with the injury of later prosecution for refusal to allow entries into the buildings.

The inspector can tell an elderly person who makes occasional jams and jellies for sale in the community that he must submit. And since food laws require inspections of toilet and hand washing areas, he can demand entry into those portions of the home. Whether they make goats' cheese, cookies, cakes, jams or chittlings, all small food producers are affected.

The inevitable effect of such a state of the law is that small producers will stop producing, or like the French before the Revolution, go underground to escape the government system, viewing the government no longer as

their protector but as their enemy. As they stop producing, large corporate food producers take up the slack, and ultimately the sole source of food production is large producers who accept warrantless inspections of their factories as the norm. Thus, American consumers increasingly lose face to face contact with the producer of the food they eat.

Further, as food production gets more concentrated into the hands of fewer producers, diversity of food types disappears to the detriment of the palate of consumers. And protection against deleterious food by knowing who made it at what point when and where is lost. Risks of widespread contaminant outbreaks increase because producers no longer produce for a limited number of known consumers, but for vast unknown numbers.

Rush v. Obledo, 756 F.2d 713, 721 (9th Cir. 1985) states,

> A family day care home is a business only when children cared for from other families for compensation are present and at all other times is a private residence. Furthermore, even when the children cared for are present, the provider retains expectations of privacy in those areas to which the day care children are denied access...
>
> Warrantless inspections are permissible in those portions of the provider's home only when the home is being operated as a family day care business.

Like the home owners in Rush, people making food in their home have a right of privacy in the home in areas where they don't make food and when they are not making it. The effect of denial of certiorari will mean that for a person who make the smallest amount of food in his home for sale it ceases virtually at all times from being a private residence. Moments when privacy can be

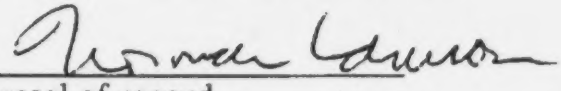
enjoyed cease to exist, for the food inspector gets to pick the moment when he wants to inspect regardless of what the occupant is doing at that time.

Finally, if the Court believes that New York v. Burger, 482 U.S. 691 (1987) applies to private homes, it should so state explicitly at this time. Otherwise, home owners will be left in a quandary and subject to criminal prosecution for relying in good faith on Camara v. Municipal Court, 387 U.S. 523 (1967), which gives them a right to refuse warrantless inspection regardless of commercial use of their homes. And the Court should instruct Virginia that Camara remains the law of the land.

Wherefore, petitioner Mary S. Vanderwoude Hill prays that she be granted rehearing, that the Court grant her a writ of certiorari, and that it reverse and dismiss the conviction.

Respectfully submitted,

MARY S. VANDERWOUDE HILL

By 

Counsel of record
Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902
State Bar ID # 19765
35mvhpetre

CERTIFICATE OF COUNSEL PURSUANT TO RULE 44.2.

Norman Lamson, counsel for petitioner Mary S. Vanderwoude Hill, hereby certifies, pursuant to Rule 44.2., that the petition for rehearing is restricted to the grounds specified in Rule 44.2., namely, substantial grounds not previously presented (other than intervening circumstances), and is presented in good faith and not for delay.

Norman Lamson

Norman Lamson